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In The Supreme Court of the United States

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION INCORPORATED,

Petitioners,

v.

MICHAEL A. RIPELLINO, LOUISE A. RIPELLINO and NICOLE RIPELLINO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

WHETHER THE NORTH CAROLINA SUPREME COURT'S DECISION ON THE VALIDITY OF RESPONDENTS' FEDERAL CONSTITUTIONAL CLAIMS FOR VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION IS DIRECTLY CONTRARY TO THIS COURT'S PRECEDENT REGARDING THE FUNDAMENTAL AND ESSENTIAL LEGAL REQUIREMENTS FOR STATING SUCH CLAIMS.

PARTIES TO THE PROCEEDING

Petitioners the North Carolina School Boards Association, Inc., North Carolina School Boards Trust, 1982 North Carolina School Boards Association Self-Funded Trust Fund, 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, and 1997 North Carolina School Boards Association Self- Funded Auto/Inland Marine Trust Fund, defendant-appellants in the state proceedings below, are referred to herein as "Petitioners." Respondents are Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino, referred to herein as "respondents." Petitioners' co-defendant in the state proceedings, the Johnston County Board of Education, is referred to herein as "the Board."

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the decision of the North Carolina Supreme Court published at 361 N.C. 214, 639 S.E.2d 441, affirming, *per curiam*, the North Carolina Court of Appeals' decision published at 176 N.C. App. 443, 627 S.E.2d 225.

CITATION TO OPINIONS BELOW

The Opinion of the North Carolina Court of Appeals which was on review to the North Carolina Supreme Court is annexed hereto and reported at 176 N.C. App. 443, 627 S.E.2d 225. (Pet. App. __). Petitioners filed a Notice of Appeal of Right to the North Carolina Supreme Court on April 11, 2006, based upon a dissenting opinion in the Court of Appeals, and contemporaneously filed a Petition for Discretionary Review of additional issues not addressed in the dissent. (Pet. App. __). The North Carolina Supreme Court granted petitioners' Petition for Discretionary Review on June 29, 2006, as reported at 633 S.E.2d 822. (Pet. App. __). On January 26, 2007, the North Carolina Supreme Court entered a *per curiam* Opinion indicating that the court was equally divided with respect to the issues addressed in the dissenting opinion, thereby affirming the Court of Appeals' decision on those issues. The Supreme Court additionally held that its grant of petitioners' Petition for Discretionary Review of additional issues was improvidently allowed. The North Carolina Supreme Court's Opinion is annexed hereto and reported at 361 N.C. 214, 639 S.E.2d 441. (Pet. App. __).

JURISDICTION

The North Carolina Supreme Court affirmed the Opinion of the North Carolina Court of Appeals with respect to the issues to be addressed in this petition on January 26, 2007. This petition is timely filed within ninety days of the entry of judgment of the North Carolina Supreme Court. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix to this Petition reproduces the texts of the Fifth Amendment, Fourteenth Amendment, and 42 U.S.C. § 1983. (Pet. App. ___).

STATEMENT OF THE CASE

The North Carolina School Boards Association, Inc. is an association of all local boards of education in North Carolina. The Association operates the North Carolina School Boards Trust, a risk management program which includes various trust funds including the North Carolina School Boards Trust Errors and Omissions/General Liability Trust Fund.[1] The Errors and Omissions/General Liability Trust Fund provides, among other coverage, general liability coverage to participating members, including the Board, in accordance with the terms and conditions of the applicable coverage agreement. (Pet. App. __).

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[1] Two other trust funds relating to worker's compensation and automobile liability were included as defendants. However, these trust funds are not at issue in this case.

Pursuant to the coverage agreement, the North Carolina School Boards Trust retains the right to assert any applicable defenses available to its members.

This case arises out of the allegations that the Board and Trust Defendants violated respondents' federal constitutional rights in exercising discretion in paying some tort claims against the Board but not others, including respondents' claim, when the defense of immunity was a ailable to the Board in each case. Respondents alleged they were injured by the Board's negligence when a traffic control gate owned and operated by the Board came into contact with a vehicle driven by respondent Nicole Ripellino on the Board's property at Clayton High School in Johnston County, North Carolina. Respondents' April 6, 2001 complaint averred that the Board had a practice of evaluating potential claims against it for purposes of determining whether to assert governmental immunity, and that the Board would assert immunity with respect to some claims, but elect to offer settlements as to others. (Pet. App. ___). In addition to various state constitutional and non-constitutional claims, respondents purported to state claims for violations of the Fifth and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983, on the basis that the Board's discretionary assertion of its statutory right to governmental immunity as to some claims, including those of respondents, violated respondents' rights to due process and equal protection. (Pet. App. __).

Relevant to this petition, the Board and the petitioners moved for judgment on the pleadings as to respondents' federal constitutional claims against the petitioners and the Board on June 23, 2004 and June 24, 2004 respectively. (Pet. App. __). On September 3, 2004, the trial court granted these motions and entered judgment on the pleadings in favor of the Board and petitioners on respondents' federal claims. (Pet. App. __). On appeal, a divided panel of the North Carolina Court of Appeals reversed this judgment, holding, among other things, that the allegations of respondents' complaint stated valid claims under the Fifth and Fourteenth Amendments for violations of federal due process and equal protection. (Pet. App. __). The dissenting opinion disagreed on that issue, concluding instead that the factual allegations of respondents' complaint failed, as a matter of federal constitutional law, to state valid claims for violations of procedural due process, substantive due process, and equal protection. (Pet. App. __).

On April 11, 2006 and April 6, 2006 respectively, the petitioners and the Board filed Notices of Appeal of Right to the North Carolina Supreme Court based upon the issues addressed in the dissenting opinion, and specifically, whether the allegations of respondents' complaint stated valid claims under the Fifth and Fourteenth Amendments for violations of federal procedural and substantive due process and equal protection. (Pet. App. __). Petitioners and the Board contemporaneously filed Petitions for Discretionary Review of additional issues not addressed by the dissent, including whether the Board was a "person" within the

meaning of 42 U.S.C. § 1983. (Pet. App. __). The North Carolina Supreme Court granted this petition on June 29, 2006. (Pet. App. __).

On January 26, 2007, the North Carolina Supreme Court entered the *per curiam* Opinion of which the Board and petitioners now seek this Court's review. The North Carolina Supreme Court was equally divided as to whether respondents' complaint stated valid federal constitutional claims for violations of due process and equal protection, thereby affirming the Court of Appeals' decision that respondents indeed stated valid claims in this regard and could proceed with these federal constitutional claims. Additionally, the North Carolina Supreme Court determined that its grant of discretionary review of additional issues had been improvidently allowed, and accordingly did not address whether the Board was a "person" within the meaning of 42 U.S.C. § 1983. (Pet. App. __). Petitioners and the Board now seek this Court's review of the North Carolina Supreme Court's affirmation of the Court of Appeals' holding that respondents' complaint was legally sufficient to state claims for violations of federal due process and equal protection. Petitioners respectfully contend that based upon the failure of respondents' complaint to state any federal constitutional claim, their claim under 42 USC § 1983 fails as a matter of law and the North Carolina Supreme Court's holdings to the contrary should be reversed. *See Paul v. Davis*, 424 U.S. 693 (1976) (petitioners not liable under § 1983 where respondent's theories of recovery were not based upon rights secured to him by the Fourteenth Amendment).

While the North Carolina Supreme Court's decision leaves the matter for further proceedings in the state trial court, its decision is final and conclusive of the issue of the legal requirements for stating a proper claim for violations of federal procedural and substantive due process and equal protection, later review of which may not be had should this case proceed to trial on the merits. *See Chambliss v. Health Sciences Foundation, Inc.*, 176 N.C. App. 388, 392, 626 S.E.2d 791, 794 (2006) (under North Carolina law, denial of judgment on the pleadings not reviewable following trial on the merits). Accordingly, this Court's review of the federal aspects of this decision is proper notwithstanding the interlocutory nature of the overall proceedings. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-81 (1975).

Petitioners note that because respondents' constitutional claims against the petitioners are identical to, and contingent upon, the constitutional claims made against the Board, the petitioners' petition is virtually identical, except as to identification of the parties, to that filed by the Board. *See Ripellino v. North Carolina School Boards Ass'n, Inc.*, 158 N.C. App. 423, 431, 581 S.E.2d 88, 94 (2003) ("Plaintiffs' claims against the trust defendants are related to and contingent upon the claims against the Board").

REASONS FOR GRANTING THE WRIT

The North Carolina Supreme Court's decision in this case affirmed the underlying Court of Appeals' holding that respondents stated valid

federal constitutional claims under the Fifth and Fourteenth Amendments, as enforced by 42 U.S.C. § 1983, based upon allegations that the Board elected to assert its statutory right to governmental immunity in the face of some potential tort claims, including those of respondents, while electing to offer settlements for other claims. The North Carolina Supreme Court so concluded notwithstanding that the face of respondents' complaint failed to contain factual allegations which implicate any legally cognizable and constitutionally protected right, or establish the presence of governmental action so arbitrary that it shocks the conscience and could not have been related to any conceivable legitimate governmental interest. Significantly, neither the North Carolina Supreme Court's decision nor the North Carolina Court of Appeals' majority decision even addressed the fundamental issue of whether respondents had a property right protected by the Fifth and Fourteenth Amendments.

Though the North Carolina Supreme Court determined its grant of discretionary review as to whether the Board was a "person" within the meaning of 42 U.S.C. § 1983 was improvidently allowed, even conceding such (strictly for purposes of argument), its decision to affirm the Court of Appeals' holding that respondents' complaint stated valid federal due process and equal protection claims is wholly and directly contrary to the decisions of this Court, and indeed, an entire well-established body of federal law on these important federal questions. This Court should address and correct this decision in order to preserve essential

consistency in analysis of these important federal questions between North Carolina and federal jurisprudence.[2]

I. THE NORTH CAROLINA SUPREME COURT'S DECISION ON THE VALIDITY OF RESPONDENTS' FEDERAL CONSTITUTIONAL CLAIMS FOR VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION IS DIRECTLY CONTRARY TO THIS COURT'S PRECEDENT REGARDING THE FUNDAMENTAL AND ESSENTIAL LEGAL REQUIREMENTS FOR STATING SUCH CLAIMS.

It is axiomatic that identification of a constitutionally protected right is a prerequisite to a plaintiff's right to sue under 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). The determination of whether such a constitutionally protected right exists is a question of law, as is an assessment of whether the government's action bears the appropriate relation to a legitimate state interest. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 289 (1986); *Vance v. Bradley*, 440 U.S. 93, 110-12 (1979); *Duamutef v. Hollins*, 297 F.3d 108, 113 (2d Cir. 2002); *League of United Latin Amer. Citizens v.*

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[2] Indeed, the federal analysis is also determinative of the viability of respondents' complaint as to their purported identical state constitutional claims, as "North Carolina courts have consistently interpreted the due process and equal protection clauses of the North Carolina Constitution as synonymous with their Fourteenth Amendment counterparts." *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002).

Clements, 999 F.2d 831, 871 (5th Cir. 1993). Accordingly, these questions are appropriately resolved by the court on a motion for judgment on the pleadings. For purposes of such review, while the factual allegations of the complaint are taken as true, the legal conclusions to be drawn therefrom are derived from the court as a matter of law. *Eastern Shore Markets, Inc. v. J.D. Associates Ltd. Partnership*, 213 F.3d 175, 180 (4th Cir. 2000).

The North Carolina Supreme Court has held that a governmental entity does not waive its immunity through the payment of a claim. *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 436 (1992). Therefore, the actions of the Board and the petitioners in deciding whether to settle or litigate a claim is not a decision on whether to assert or waive immunity. Such actions, by necessity, must be within the discretionary authority of the governmental entity.

Here, as enumerated below, the factual allegations of respondents' complaint are, under the unambiguous precedent of this Court, *insufficient as a matter of federal constitutional law* to state valid claims for violations of procedural and substantive due process, as well as equal protection. The North Carolina Supreme Court's affirmation of the Court of Appeals' determination to the contrary is wholly erroneous, in direct contravention to numerous decisions of this Court, and must be corrected.

A. Procedural Due Process

In assessing application of procedural due process, this Court has recognized that the first determinative inquiry is "whether there exists a liberty or property interest which has been interfered with by the State." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), this Court addressed the nature of a property interest which is afforded due process protection. The *Roth* court noted that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have *more than a unilateral expectation* of it. He must, instead, have a *legitimate claim of entitlement* to it." *Id.* at 577 (emphasis added). This Court more recently emphasized, citing *Roth*, that "[t]he procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.' " *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005).

The *Gonzales* court expounded that "[s]uch entitlements are ' "of course, ... not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." ' " *Id.* (citations omitted). Significantly, however, "[t]hat determination, despite its state-law underpinnings, is ultimately one of federal constitutional law. 'Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest

rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.' " *Id.* at 757 (citations omitted). "Resolution of the federal issue begins, however, with a determination of what it is that state law provides." *Id.* To this extent, and dispositive of this issue in the present case, the *Gonzales* court expressly observed that "cases recognize that a benefit *is not a protected entitlement if government officials may grant or deny it in their discretion*." *Id.* at 756 (emphasis added).

Thus, in *Gonzales*, this Court held that the respondent did not have a constitutionally protected property interest in police enforcement of a restraining order because, upon review of the relevant statute, the court concluded that "[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory." *Id.* at 760. The court explained that the respondent's "alleged interest stems not from common law or contract, but only from a State's statutory scheme. If she was given a statutory entitlement, the Court would expect to see some indication of that in the statute itself." *Id.* at 749. Indeed, this Court has recognized that a liberty interest cannot be created unless the regulations purportedly granting that right contain " 'explicitly mandatory language,' *i.e.*, *specific directives* to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome *must* follow." *Thompson*, 490 U.S. at 463 (emphasis added) (holding regulations at issue "lack the requisite relevant mandatory language. They stop short of requiring that a particular result is to be

reached upon a finding that the substantive predicates are met.").

The same rationale was applied in *Roth*, wherein the respondent, hired to teach at a university for a fixed term of one year, alleged a due process violation when he was informed without explanation that he would not be rehired for the ensuing year. The terms of the respondent's employment agreement provided only for his employment up to June 30, 1969, and did not provide for contract renewal. "Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment." *Roth*, 408 U.S. at 578. Accordingly, while the respondent "surely had an *abstract concern* in being rehired," he could not have a property interest sufficient to invoke protections of procedural due process. *Id.* (emphasis added); *see also, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59-60 (1999).

Indeed, the Eighth Circuit has aptly held that there can be no constitutionally protected property interest in pursuing a claim or settlement against a governmental entity where the applicable statute "create[s] an *opportunity* to file a claim for settlement, not an *entitlement* to payment of a benefit," and particularly where the governmental entity has not waived its sovereign immunity. *See Schneider v. U.S.*, 27 F.3d 1327, 1333 (8th Cir.1994) (emphasis added); *see also, e.g., Froland v. Coble*, NO. 3:05 CV 280 H (W.D.N.C. Jan 23, 2006) ("The Plaintiff has also failed to state a § 1983 claim for a

due process or equal protection violation. Although the Plaintiff certainly may have hoped that the Defendants would offer a settlement without the necessity of having to file a lawsuit, her expectation does not rise to the level of a constitutional right or entitlement sufficient to establish a due process or equal protection claim.").

Similarly, in *Grimes v. Pearl River Valley Water Supply*, 930 F.2d 441 (5th Cir. 1991), the plaintiffs brought a wrongful death action against the defendant, and argued that the Mississippi sovereign immunity statute, providing defendants with immunity from wrongful death damages, violated their due process rights. *Id.* at 444. In rejecting the plaintiffs' constitutional arguments, the Fifth Circuit observed that while the state wrongful death statute may have created the cause of action, it was "the sovereign immunity statute [which] defined the *property interest*. In essence, the property interest involved in the case at bar is not protected because the [Pearl River Valley Water Supply] is the defendant. State law does not allow suit against the [Pearl River Valley Water Supply]." *Id.* at 444 (emphasis added).

Application of these settled federal principles to the present case leaves no dispute that the North Carolina Supreme Court's affirmation of the Court of Appeals' holding that respondents' complaint stated a valid procedural due process claim is wholly erroneous and in *direct contravention* to this Court's unambiguous precedent on this very issue. Here, as in *Grimes*, the relevant sovereign immunity statute defines the property interest at issue. That statute,

N.C. Gen. Stat. § 115C-42, expressly affords the Board the *right* to assert governmental immunity against tort claims, while simultaneously providing the Board the ability to determine when to *waive* its entitlement to that defense. *See* N.C. Gen. Stat. § 115C-42 (2007) (providing the Board is "hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property" through procurement of liability insurance, but providing that "nothing in this section shall be construed to deprive any local board of education of any defense whatsoever to any such action for damages or to restrict, limit, or otherwise affect any such defense which said board of education may have at common law or by virtue of any statute.").

As such, the Board had every right to assert governmental immunity as a defense to respondents' tort claims. *See* N.C. Gen. Stat. § 115C-42. This very right was upheld by the North Carolina Court of Appeals in its holding in *Ripellino I* that the Board is entitled to governmental immunity on respondents' claims of up to $100,000 and that participation in the North Carolina School Boards Trust was not a waiver of governmental immunity. (Pet. App. ___). This holding was not disturbed on appeal, and therefore constitutes the law of the case. (Pet. App. ___). Just like the statutory provisions at issue in *Gonzales*, N.C. Gen. Stat. § 115C-42 affords the Board *discretion* to determine whether and to what extent it will waive immunity through the procurement of insurance. Respondents' complaint fails to set forth *any* allegations establishing the existence of the "mandatory language" and "specific

directives" discussed above which would remove from the Board's *full discretion* the ability to determine when it might or might not assert an immunity defense. As this Court expressly held in Gonzales, and in light of the Board's statutory grant of discretion to assert immunity, respondents can have nothing more than a *unilateral expectation* that the Board will not assert immunity as a defense to their claims. Respondents' complaint shows no basis upon which respondents have any legitimate claim of *entitlement* to the payment of respondents' tort claim by the Board or the petitioners, and it therefore fails to contain the essential prerequisite allegations of a constitutionally protected property interest.

Furthermore, federal law establishes that state law immunity defenses such as N.C. Gen. Stat. § 115C-42, which operate to bar state law tort claims, do not effect an impermissible deprivation of property. *See, e.g., Daniels v. Williams*, 474 U.S 327, 333 (1986); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Martinez v. State of California*, 444 U.S. 277, 283 (1980); *Davidson v. O'Lone*, 752 F.2d 817, 830 (3d Cir. 1984). In *Martinez*, this Court found that "even if one characterizes [an] immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest..." *Martinez* at 282, 557. Thus, the Board's statutorily granted immunity defense negates the existence of a protected property interest.

Respondents point to no common law rule, contract, statute, or any other source which grants

them the right to have their tort claim paid. The complaint simply alleges a "right to recover for the bodily injury and medical expenses portion of the Ripellino claim." (Pet. App. ___). Indeed, respondent is unable to point to any source granting this property right because N.C. Gen. Stat. § 115C-42 specifically precludes respondent's alleged right to recover from the Board or the petitioners where there is no waiver of immunity through the purchase of liability insurance.

By allowing respondents' due process claims to proceed notwithstanding, the North Carolina Supreme Court has effectively held either (1) respondents do not need to establish a constitutionally protected property interest in order to state a federal due process claim; or (2) respondents have a constitutionally protected property interest in recovering in tort from a governmental entity such as the Board and a risk management program such as the petitioners. Either conclusion squarely contravenes this Court's settled precedent, and will injuriously affect the essential consistency between North Carolina jurisprudence and established federal law on this important federal question. Indeed, the North Carolina Supreme Court's effective conversion of a unilateral expectation of tort recovery against a governmental entity into a constitutionally protected property right essentially abrogates the governmental immunity to which the Board is statutorily entitled. Accordingly, this Court should review the North Carolina Supreme Court's decision as directly contrary to this Court's precedent (and

indeed, a whole body of established federal law) on this important federal question.

B. Substantive Due Process

This Court has repeatedly emphasized "that '[t]he touchstone of due process is protection of the individual against arbitrary action of government' . . . in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citation omitted). The Court has also repeatedly emphasized that "only the most *egregious* official conduct can be said to be 'arbitrary in the constitutional sense.' " *Id.* (citations omitted) (emphasis added). The Court has noted its self-reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). As the *Lewis* court summarized: "[t]o this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which *shocks the conscience*." *Lewis*, 523 U.S. at 846 (emphasis added). The court observed that the "shocks the conscience" test was first formulated in *Rochin v. People of CA*, 342 U.S. 165 (1952), wherein it found the forced pumping of a suspect's stomach sufficient to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." *Id.*; *see also, e.g.*, *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) (substantive due process only protects against state action which is "so arbitrary and irrational, so unjustified by any circumstance or governmental

interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.").

Notably, where the government action at issue does not interfere with fundamental rights, the action is violative of substantive due process only if "respondent can demonstrate that there is no rational connection between the [action]...and the [legitimate government interest]." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Significantly, under rational basis review, if there is *any conceivable* legitimate governmental interest which supports the contested action, the action cannot be said to be "'arbitrary and capricious' and hence cannot offend substantive due process norms." *Sam & Ali, Inc. v. Ohio Dept. of Liquor Control*, 158 F.3d 397, 403 (6th Circuit 1998). It is irrelevant whether the record contains any evidence of the actual basis for the decision. *See Central State University v. American Ass'n of University Professors, Central State University Chapter*, 526 U.S. 124, 128 (1999) ("The fact that the record before the Ohio Courts did not show that collective bargaining in the past had lead to the decline in classroom time for faculty does not detract from the rationality of the legislative decision.").

As set forth above, as respondents cannot, as a matter of law, demonstrate any constitutionally protected property interest in a monetary recovery or settlement with the Board or the petitioners, there can exist no fundamental right to such a benefit. Therefore, respondents' substantive due process

claim must be dismissed unless the actions of the Board or petitioners could not be rationally related to any *conceivable* legitimate governmental interest, regardless of whether such interest was the *actual* motivation for the Board's assertion of immunity to respondents' claims.

In this regard, respondents' complaint falls far short, as a matter of law, of stating a valid due process claim, as the Board's alleged policy of electing to settle some tort claims but assert immunity as to other such claims clearly could bear relation to a *conceivable* legitimate governmental interest. The Board pled in its answer (properly considered on judgment on the pleadings) that in certain specific circumstances, "such as where defense costs would exceed the costs of settlement and where a non-immune defendant was entitled to coverage," it would elect to settle claims. (Pet. App. __). Similarly, the answer of the petitioners, also affirmatively states that they elect, in certain specific circumstances, to settle claims where "the settlement amount is less than the potential cost of defense or in situations which include a claim against an individual who does not have immunity, or a claim for which the immunity defense is not available." (Pet. App. ___).

These affirmatively pled bases alone establish that the Board and the petitioners' practice in this regard could bear some relation to a conceivable legitimate governmental interest. The Board and the petitioners clearly have a legitimate interest in conserving taxpayer dollars and their limited resources, both financial and legal. Just as North

Carolina courts have recognized the legitimate governmental interest in conserving funds, so too has this Court noted the legitimacy of that interest. *See Saenz v. Roe*, 526 U.S. 489, 506 (1999); *see also, e.g., Wessel v. Glendening*, 306 F.3d 203, 212 (4th Cir. 2002) (noting "legitimate state interest in conservation of scarce funds."); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987) ("conserving money" constitutes a "legitimate purpose of the State."); *State v. Barfield*, 298 N.C. 306, 319, 259 S.E.2d 510, 523 (1979) (government has legitimate interest "in securing the best utilization of its legal resources."); *Harris v. Flaherty*, 90 N.C. App. 110, 115, 367 S.E.2d 364, 366 (1988) (unnecessary depletion of State funds and resources a legitimate governmental interest). Additionally, that the Board and petitioners might elect to pay claims where an individual defendant within the public school system may not be entitled to the protection of governmental immunity could conceivably be related to what the North Carolina Supreme Court has recognized as a legitimate interest in ensuring that individuals performing jobs of a public nature (such as a school principal or superintendent) be protected from repeated individual exposure to trials and damage awards, lest such persons not be inclined to fill these essential public roles. *See, e.g., Meyer v. Walls*, 347 N.C. 97, 112-13, 489 S.E.2d 880, 888-89 (1997).

In short, because the Board and the petitioners' exercise of discretion in assessing whether to settle certain claims clearly bears some relation to a conceivable legitimate governmental interest, their alleged actions in this regard cannot,

as a matter of law, rise to the constitutionally impermissible level of "shocking the conscience." That the Board and petitioners attempt to handle claims in a financially judicious manner, which may result in the settlement of some claims but not all claims, is not so capricious and unreasonable that it "shocks the conscience." In fact, the Board and petitioners would be remiss if they did *not* attempt to so conserve limited government resources and taxpayer dollars. Their actions do not even approach those present in *Rochin*, wherein this Court formulated the "shocks the conscience" standard. Nor can it "shock the conscience" that Board asserted immunity as to respondents' tort claims where they was *statutorily entitled* to do so. *See* N.C. Gen. Stat. § 115C-42.

The factual allegations of respondents' complaint fail as a matter of law to support a legal conclusion that the Board and petitioners' settlement practices violated federal substantive due process. Respondents' complaint alleges that "upon information and belief, if the immunity doctrine could be raised, it was raised, but thereafter some claims were nevertheless paid." (Pet. App. ___). Therefore, by respondents' own admission in their complaint, the Board asserts immunity whenever possible, and thus, the decision to assert immunity in this or any other case cannot be considered arbitrary or capricious, or shocking to the conscience. The North Carolina appellate courts' legal conclusions to the contrary are entirely unsupported by federal law, are directly contrary to this Court's unambiguous precedent as to the legal requirements for stating a violation of substantive due process,

and effectively and impermissibly, "expand the concept of substantive due process," *Collins*, 503 U.S. at 125, requiring this Court's review.

C. Equal Protection

This Court has explained that " 'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). However, "most laws differentiate in some fashion between classes of persons. The Equal Protection Clause ... simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). For purposes of an equal protection analysis, "persons who are in all relevant respects alike" are those "similarly situated." *Id.*

"Similar to a substantive due process review, this Court has held that where a governmental policy or action is alleged to be violative of the right to equal protection, a rational basis test is employed in the absence of a fundamental right or suspect class." *Gonzalez v. Chertoff*, 454 F.3d 813, 818 (8th Cir. 2006). As with substantive due process, governmental action which "neither proceeds along suspect lines nor infringes fundamental constitutional rights *must* be upheld against equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a

rational basis for the classification." *Id.* (emphasis added).

Significantly, under such rational basis review, a government's classification comes "bearing a *strong presumption of validity* . . . and those attacking the rationality of the [governmental] classification have the burden 'to negative every conceivable basis which might support it.' " *FCC Beach Communications, Inc.*, 508 U.S. 307, 314-15 (citations omitted). *See also City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (emphasis added) (absent suspect classification, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest). Under such analysis, "it is entirely *irrelevant* for constitutional purposes whether the conceived reason for the challenged distinction *actually* motivated the legislature." *Id.* (emphasis added); *see also, Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (burden is on respondent to "negative every conceivable basis which might support it, whether or not the basis has a foundation in the record"). "In other words, a [governmental] choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315 "Thus, '[t]he burden upon a party seeking to overturn a legislative enactment for irrationally discriminating between groups under the equal protection clause is an extremely heavy one.' " *Sam & Ali, Inc.*, 158 F.3d at 403 (citation

omitted); *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). [3]

Once again, the North Carolina Supreme Court's decision evinces a fundamental misapprehension of this proper standard. Here, respondents' complaint did not identify any inherently suspect criteria such as race, religion, or sex in attempting to assert discrimination. In fact, respondents did not aver *any* factual basis of discrimination. Rather, respondents attempt to cobble an equal protection claim by averring they were treated differently from other "claimholders." (Pet. App. ___). This does not meet the standard of "similarly situated" persons, which, again, requires identity in "all relevant respects."

Indeed, it is simply "not plausible or arguable" that respondents could be similarly situated in all relevant respects to every other potential tort claimant against the Board. *See Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006). The nature of tort claims renders it practically inevitable that certain claimants will be dissimilar in some aspects. That the Board and petitioners consider different factors in assessing whether to settle certain claims (as alleged in their answers) is entirely reasonable,

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[3] Significantly, the North Carolina General Assembly essentially codified this presumption of validity of petitioner's actions in N.C. Gen. Stat. § 115C-44(b) (2006) ("In all actions brought in any court against a local board of education, the order or action of the board *shall be presumed to be correct* and the burden of proof shall be on the complaining party to show the contrary." (emphasis added)).

and indeed necessary. As a result, not every tort claimant is offered a settlement. For example, as pled in the underlying answers, settlement may be offered in cases where individual defendants may not be entitled to the protections of governmental immunity. However, respondents here did not sue any such individuals in the present case, affirmatively establishing that respondents are *not*, in fact, similarly situated to all other tort claimants to whom the Board or petitioners may offer a settlement. Regardless, respondents' complaint does not allege facts establishing that they, their claims or circumstances, were similarly situated to all tort claimants with whom the Board and petitioners have settled, thereby foreclosing a valid equal protection claim. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Tri-County Paving, Inc.*, 281 F.3d at 439-40.

Even if respondents' complaint had alleged factual allegations sufficient to establish that they were similarly situated in all relevant respects to all other tort claimants against the Board, the settlement practices at issue once again bear relation to a *conceivable* legitimate governmental interest, as addressed in detail above with respect to substantive due process. Moreover, a discriminatory intent or purpose is required to establish a violation of equal protection. *City of Cuyahoga Falls, Ohio v. Buckeye Comty. Hope Found.*, 538 U.S. 188, 194 (2003). Respondents' complaint is entirely devoid of any factual allegations which could meet such a requirement.

Simply stated, respondents' complaint altogether failed to allege the presence of the factual circumstances which this Court has held necessary to support a claim for violation of equal protection. The North Carolina courts' decisions to allow such a federal constitutional claim to proceed under such facially invalid allegations is entirely erroneous and contrary to the significant federal constitutional principles espoused by this Court and an entire body of federal constitutional law.

CONCLUSION

The North Carolina Supreme Court's *per curiam* affirmation of the Court of Appeals' determination clearly contravenes the well-established precedent of this Court as to the most fundamental and essential elements of stating valid federal constitutional claims for violations of due process and equal protection. Respondents' complaint wholly failed to contain factual allegations which, taken as true, support a legal conclusion that petitioners violated respondents' Fifth and Fourteenth Amendment rights as enforced through 42 U.S.C. § 1983. The North Carolina Supreme Court's determination that respondents may nevertheless proceed with these federal constitutional claims is directly contrary to established federal law, and renders North Carolina jurisprudence on these important federal questions so inconsistent with this Court's precedent, that review and correction is essential. Accordingly, this petition for certiorari should be granted, and the decision of the North Carolina Supreme Court reversed.

Respectfully submitted,

_/s/_____
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No. 180A06

FILED: 26 JANUARY 2007

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. ___, 627 S.E.2d 225 (2006), reversing and remanding orders entered 3

September 2004 and 9 September 2004 by Judge Knox V. Jenkins, Jr. in Superior Court, Johnston County, granting summary judgment and judgment on the pleadings in favor of all defendants. On 29 June 2006, the Supreme Court allowed defendants' petitions for discretionary review of additional issues. Heard in the Supreme Court 8 January 2007.

Mast, Schulz, Mast, Mills, Johnson & Wells, P.A., by Bradley N. Schulz, for plaintiff-appellees.

Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher, for defendant-appellants North Carolina School Boards Association, Inc., North Carolina School Boards Trust, 1982 North Carolina School Boards Association Self-Funded Trust Fund, 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, and 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund.

Cranfill, Sumner & Hartzog, L.L.P., by Rachel B. Esposito and Meredith T. Black, for defendant-appellant Johnston County Board of Education.

Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, for North Carolina Council of School Attorneys, amicus curiae.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, the members of the Court are equally divided. Therefore, those portions of the Court of Appeals opinion are affirmed without precedential value. See, *e.g., Barham v. Hawk,* 360 N.C. 358, 625 S.E.2d 778 (2006). The Court, however, unanimously concludes that the Court of Appeals erred in remanding the case to the trial court for entry of summary judgment in favor of plaintiffs on their non-constitutional claims. Accordingly, we reverse the Court of Appeals and remand to that Court for remand to the trial court for further proceedings on plaintiffs' non-constitutional claims. As to additional issues, discretionary review was improvidently allowed.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice HUDSON did not participate in the consideration or decision of this case.

NO. COA04-1681

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO

Plaintiffs-Appellants

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A

DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; AND THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants-Appellees

Appeal by plaintiffs from orders entered 3 September 2004 and 8 September 2004 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 23 August 2005.

Mast, Schulz, Mast, Mills, Johnson & Wells, P.A., by Bradley N. Schulz and Don R. Wells, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Stephanie Hutchins Autry and Rachel B. Esposito, for defendant-appellee Johnston County Board of Education.

Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher, for defendants-appellees Trust Defendants.

CALABRIA, Judge.

Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino (collectively "plaintiffs") appeal from orders granting summary judgment and judgment on the pleadings to the Johnston County Board of Education ("the Board") and to the North Carolina

School Boards Association, Inc.; the North Carolina School Boards Trust; 1982 North Carolina School Boards Association Self-Funded Trust Fund; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund; and the 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund (collectively "Trust Defendants"). We reverse and remand.

A summary of the facts in this case are set out in *Ripellino v. North Carolina School Board Association, Inc.*, 158 N.C. App. 423, 425, 581 S.E.2d 88, 90 (2003) ("*Ripellino I*") as follows:

> At the end of classes on 9 March 1998, [Nicole Ripellino ("Nicole")] was departing from Clayton High School in Johnston County in her parent[s'] vehicle. A traffic control gate owned by the Johnston County Board of Education ("the Board") swung closed, struck the vehicle, and injured Nicole. In October 1998, the Ripellinos were paid $2,153.18 for property damage. The Board refused to pay medical expenses or other compensation.
>
> On 26 March 2001 . . . plaintiffs filed suit against the Board, and [the Trust Defendants]. Plaintiffs alleged (1) a negligent personal injury claim against the Board on the part of Nicole, (2) a medical expenses claim on the part of Nicole's parents against the Board,

> (3) declaratory judgment that immunity had been waived through (a) participation in the trust and (b) the payment of property damages, (4) unfair and deceptive trade practices against all defendants, (5) 42 U.S.C. § 1983 claim . . . and constitutional claims against all defendants, and (6) punitive damages.
>
> Upon motion of the Board, the trial court bifurcated the trial allowing the issues of whether the Board was immune from suit and whether the Board had waived sovereign immunity to be resolved while the other claims were stayed. . . . [T]he trial court granted summary judgment in favor of all defendants on all claims. Plaintiffs appeal[ed.] . . .

In *Ripellino I,* this Court held, *inter alia*: (1) the Board waived sovereign immunity to the extent that its insurance policies covered claims in excess of $100,000 and less than $1,000,000; (2) the Board could not use sovereign immunity as a defense against constitutional and 42 U.S.C. § 1983 claims; and (3) the Board was immune from punitive damages claims because it is a governmental entity. *Id.*

On remand to the trial court after *Ripellino I*, the Board and the Trust Defendants filed motions for summary judgment for all non-constitutional claims and judgment on the pleadings for claims

under 42 U.S.C. § 1983 and the North Carolina Constitution. The trial court entered orders for summary judgment and judgment on the pleadings. Plaintiffs appeal.

I. Summary Judgment as to the Non-Constitutional Claims

Plaintiffs argue the trial court erred by granting the Board's and the Trust Defendants' motions for summary judgment regarding the non-constitutional claims. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, and drawing all reasonable inferences in her favor." *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 611, 538 S.E.2d 601, 607 (2000). On appeal, we review the granting of a summary judgment motion *de novo*. *Granville Farms, Inc. v. County of Granville*, ___ N.C. App. ___, ___, 612 S.E.2d 156, 158 (2005).

Plaintiffs specifically argue that the trial court erred by granting the Board's and the Trust Defendants' motions for summary judgment regarding the non-constitutional claims because the plaintiffs presented evidence on all the elements of a negligence claim and sovereign immunity is waived

to the extent the Board's insurance policy provides coverage for claims in excess of $100,000 and less than $1,000,000. Plaintiffs additionally contend that their claim is within this monetary range and included in the broad wording of the Trust Agreement, which provides coverage for:

> all or part of a Claim made or any civil judgment entered against any of its members . . . when such Claim is made or such judgment is rendered as Damages on account of any act done or omission made . . . in the scope of their duties as members of the local board of education or as employees.

The Board responds the trial court properly granted summary judgment because Exclusion Number 18 in the Coverage Agreement excludes coverage for "any Claim arising out of the ownership, maintenance, operation, use, loading or unloading of any Automobile" and Nicole was hit by a gate while driving an automobile. Plaintiffs contend, however, that the malfunctioning of the gate could have occurred even if Nicole had not been driving a car and the gate would have injured her even if she had been walking or riding a bicycle. We agree with plaintiffs and reverse because the forecast of evidence leaves no material dispute over the fact that plaintiffs' injuries did not "arise out of" the use of an automobile.

Our Supreme Court has held that "the standard of causation applicable to the ambiguous 'arising out of' language . . . is one of proximate

cause. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 74 (1986). "Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Mattingly v. North Carolina R.R.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961). Viewing the evidence in the light most favorable to defendants, no material dispute exists as to the proximate cause of plaintiffs' injury. Although defendants argue that plaintiff traveled in a car at the time of the incident, they have failed to show an automobile proximate cause, i.e., any action or omission by plaintiffs' automobile that would have resulted in a person of ordinary prudence foreseeing plaintiffs' injuries. Since there is no automobile proximate cause on these facts, plaintiffs' injury did not fall within the language of Exclusion 18, and we reverse the summary judgment in favor of the Board and remand for entry of summary judgment in favor of plaintiffs. Likewise, because the trial court erred in granting summary judgment in the Board's favor, it also erred in granting summary judgment in the Trust Defendants' favor, whose liability is derivative to the Board's liability. Accordingly, we reverse summary judgment in favor of the Trust Defendants and remand for entry of summary judgment in favor of plaintiffs.

II. Judgment on the Pleadings as to the Constitutional Claims

Plaintiffs argue that the trial court erred in granting judgment on the pleadings in favor of defendants regarding the state constitutional claims and United States constitutional claims under 42 U.S.C. § 1983. "The granting of judgment on the pleadings is proper when there does not exist a genuine issue of material fact, and the only issues to be resolved are issues of law. In reviewing a motion for judgment on the pleadings, [this] court must consider the evidence in the light most favorable to the non-moving party, accepting as true the factual allegations as pled by the non-moving party." *Davis v. Durham Mental Health/Dev. Disabilities/Substance Abuse Area Auth.*, 165 N.C. App. 100, 105, 598 S.E.2d 237, 241 (2004) (citations omitted). Moreover, when reviewing a trial court's granting of a Rule 12(c) motion, this Court considers, "only the pleadings and exhibits which are attached and incorporated into the pleadings[.]" *See id.*, 165 N.C. App. at 104, 598 S.E.2d at 240 (citations omitted).

Plaintiffs argue that their equal protection and due process rights have been violated under our federal and state constitution.
Plaintiffs seek to use 42 U.S.C. § 1983 to enforce their federal constitutional rights. *See Gonzaga University v. Doe*, 536 U.S. 273, 285, 153 L. Ed. 2d 309, 322 (2002) ("Section 1983 . . . provides a mechanism for enforcing individual rights 'secured' elsewhere, i.e., rights independently secured by the Constitution and laws of the United States").

Plaintiffs' claims are based on their contentions that: (1) the Board has a "policy and custom of paying some claims but not paying others, when immunity could be raised in each one," and (2) the Board has "paid the property damage, but [has] asserted immunity in the remaining portion of Plaintiff's claim[.]"

They also seek to remedy these alleged deprivations directly under our state constitution, which states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19.

Plaintiffs specifically allege, in pertinent part:

> 15. Upon information and belief, in the past, the Association, Trust Defendants, and The Johnston County Board of Education could have raised the doctrine of immunity on many tort claims, but chose instead, for various reasons that will be proven at trial, to pay claims even in light of the

immunity defense. Upon information and belief, the Association and Trust Defendants, in conjunction with The Johnston County Board of Education, would examine each claim to see if the immunity doctrine could be raised . . . but thereafter some claims were nevertheless paid. This disparate treatment of claimholders is prohibited by the United States and North Carolina Constitutions, as well as 42 U.S.C. § 1983. . . .

44. At all times pertinent hereto, [defendants] . . . in claiming immunity as to the Plaintiffs' claims for personal injury and medical expenses, . . . have subjected these Plaintiffs to the deprivation of their equal protection and substantive due process rights under the United States Constitution, as enforced by 42 U.S.C. § 1983, and Article 1, [§] 19 of the North Carolina Constitution.

45. These Plaintiffs have been denied due process and equal protection of the law as the Defendants have paid the property damage, but have asserted immunity in the remaining portion of Plaintiffs' claim, but have, upon information and belief, customarily waived it for similarly situated individuals who have been compensated for tort damages.

46. [Defendants'] policy and custom of paying some claims but not paying others, when immunity could be raised in each one, has played a part in the violation of federal and state law. Additionally, the Defendants' conduct in this case, of paying the property damage, and assuming liability for the claim, and then refusing to pay the personal injury and medical expense portion of the claim, is a violation of Plaintiffs' federal and state constitutional rights, as a matter of law.

47. Upon information and belief, the [Defendants] have what amounts to be unbridled discretion to resolve claims filed with the local board of education.

48. As a result of the conduct of these Defendants, the Plaintiffs have been deprived of their right to recover for the bodily injury and medical expenses portion of the Ripellino claim.

49. The Fourteenth Amendment to the United States Constitution, Article I, [§] 19 of the North Carolina Constitution, and 42 U.S.C. § 1983 protect these Plaintiffs against intentional and arbitrary discrimination, being the conduct of the [defendants] as to these Plaintiffs.

> 50. As a proximate result of the Fifth and Fourteenth Amendments to the United States Constitution, Article 1. [§] 19 of the Constitution of the State of North Carolina, and 42 U.S.C. § 1983 violations by [defendants], the Plaintiffs are entitled to recover damages.

These allegations amount to more than "conclusory, unwarranted deductions of fact, or unreasonable inferences," *Good Hope Hosp., Inc.* v. N.C. Dep't. of Health and Human Serv., ___ N.C. App. ___, ___, 620 S.E.2d 873, 880 (2005) (citations omitted), and comply with the liberal standard of notice pleading applied in this State, under which "a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724 (1998) (citations omitted).

In regard to the judgment on the pleadings as to the claims under 42 U.S.C. § 1983, we consider an issue of first impression, whether a school board is a person within the meaning of 42 U.S.C. § 1983.

By federal statute,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (2005).

The Board argues that the trial court properly granted judgment on the pleadings because it is well-settled that neither the State of North Carolina nor its respective agencies are "persons" within the meaning of § 1983 when the remedy sought is monetary damages. In *Will v. Michigan Dep't. of State Police*, the United States Supreme Court held that states are not "persons" within the meaning of § 1983 and further noted that "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration[.]" 491 U.S. 58, 66-67, 105 L. Ed. 2d 45, 55 (1989). In *Howlett v. Rose*, the Supreme Court reemphasized that "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity are not subject to suit under § 1983 in either federal court or state court." 496 U.S. 356, 365, 110 L. Ed. 2d 332, 346 (1990). The opinion clarified which law applies: "[T]he elements of, and the defenses to, a federal cause of action [such as § 1983] are defined by federal law[,]" *id.*, 496 U.S. at 372, 110 L. Ed. 2d at 352, and "[t]o the extent that the [state] law of sovereign immunity reflects a substantive disagreement with the extent

to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." *Id.*, 496 U.S. at 377-78, 110 L. Ed. 2d at 354. Accordingly, we apply federal law to determine whether our local school boards should be considered "persons" within the meaning of § 1983.

In *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 50 L. Ed. 2d 471 (1977), the United States Supreme Court considered "whether [an Ohio city's] Board of Education [was] to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or [was] instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Id.*, 429 U.S. at 280, 50 L. Ed. 2d at 479. The Court noted that, "the answer depends, at least in part, upon the nature of the entity created by state law." *Id.* The Court considered that *under Ohio law* the "State" did not include "political subdivisions." Local school boards were expressly considered part of "political subdivisions," and therefore, were not part of the State. The Court also found significant that even though the local school boards received money and guidance from the State, they could also issue bonds and levy taxes. These facts lead the Supreme Court to conclude that the Ohio local school board was "more like a county or city than it is like an arm of the State." *Id.*

Although we recognize that Eleventh Amendment immunity is a separate inquiry from whether or not a given entity is a "person" within the

meaning of § 1983, Eleventh Amendment immunity is, nonetheless, a consideration in determining congressional intent under § 1983. *See Will, supra.* We, therefore, consider the nature of the local school boards under North Carolina law. *See Mt. Healthy, supra.*

There is conflicting authority from our Supreme Court about whether local school boards are considered local entities or part of the State. Our Supreme Court has most recently held, "County and city boards of education serve very important, *though purely local functions.* The State contributes to the school fund, but the local boards select and hire the teachers, other employees and operating personnel. The local boards run the schools." *Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 463, 109 S.E.2d 211, 216 (1959). In *Turner,* our Supreme Court also held that the Tort Claims Act does not apply to local school boards, except as amended by N.C. Gen. Stat. § 143-300.1, because "[i]n no sense may we consider the Gastonia City Board of Education in the same category as the State Board of Education and the State Highway & Public Works Commission." *Id. See also Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit.*, 326 N.C. 603, 392 S.E.2d 579 (1990) (applying § 1983 to remedy a due process violation by a local school board when it is not clear if the issue of a local school board being "a person" within the meaning of § 1983 was raised by the parties).

However, in an earlier decision, our Supreme Court said:

> The public school system, including all its units, is under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable. *When functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government*, so general as to require appropriate limitations on their exercise; *they express the immediate power of the State*, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution and under its direct delegation.

Bridges v. Charlotte, 221 N.C. 472, 478, 20 S.E.2d 825, 830 (1942). *See also Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 10-11, 418 S.E.2d 648, 655 (1992) (holding that the doctrine of *nullum tempus* applied to a local school board because it was "acting as *an arm of the State* and pursuing the governmental function of constructing and maintaining its schools." (Emphasis added)).

Since precedent is unclear whether school boards are considered part of the State, we consider the underlying structure of our school system. The North Carolina Constitution emphasizes the importance of education in our state: "Religion, morality, and knowledge being necessary to good

government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. art. IX, § 1. Our forefathers further provided: "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const., art. IX, § 2(1).

Pursuant to these constitutional mandates, our General Assembly has enacted legislation for "[a] general and uniform system of free public schools . . . throughout the State." N.C. Gen. Stat. § 115C-1. The State Board of Education is vested with the powers to oversee "general supervision and administration of the free public school system." N.C. Gen. Stat. § 115C-12. Local boards of education responsibilities include the duty "to provide adequate school systems within their respective local school administrative units." N.C. Gen. Stat. § 115C-47(1). By statute, local boards are corporate bodies that can sue and be sued. N.C. Gen. Stat. § 115C-40. Yet, the fact that our local school boards are corporate bodies "does not mean that the Legislature has waived immunity from liability for torts for such boards." *Fields v. Durham City Bd. of Educ.*, 251 N.C. 699, 111 S.E.2d 910 (1960). It is noteworthy, however, that whether an entity has sovereign immunity under state law is not determinative of whether that entity is part of the State for purposes of federal law. For instance, entities, such as counties, have sovereign immunity under state law but are not part of the State under

federal law. *See Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 ("As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity. The doctrine applies when the entity is being sued for the performance of a governmental function. But it does not apply when the entity is performing a ministerial or proprietary function"). *But cf. Monell v. Dept. of Social Serv. of New York*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies").

Also relevant to our discussion is the manner chosen by our General Assembly to select members of local boards of education. The members are elected in local elections. N.C. Gen. Stat. § 115C-37(b). However, there is some authority from our Supreme Court that members of local boards of education hold a public office under the State. *See Edwards v. Bd. of Educ. of Yancey County*, 235 N.C. 345, 70 S.E.2d 170 (1952) (holding a "member of the county board of education holds a public office under the State"). *But see Turner, supra.*

The financing of the public school system is provided by State, local, and federal governments. Our General Assembly propounded a state policy "to provide from State revenue sources the instructional expenses for current operations of the public school

system as defined in the standard course of study." N.C. Gen. Stat. § 115C-408 (2005). Another constitutional provision provides that the General Assembly has authority to require local governments to contribute to the costs of education. N.C. Const. art. IX, § 2(2). In accordance with this Constitutional provision, our legislature has said, "It is the policy of the State of North Carolina that the facilities requirements for a public education system will be met by county governments." N.C. Gen. Stat. § 115C-408. Moreover, local school boards have authority to have taxes "levied on [their] behalf as a school supplemental tax" by the county. N.C. Gen. Stat. § 115-511. However, "[t]he board of county commissioners may approve or disapprove of this request in whole or in part," *id.*, although local school boards can bring suit to enforce a county's obligation to raise funds. N.C. Gen. Stat. § 115C-431.

In considering the Eleventh Amendment for purposes of determining congressional intent under § 1983, we are mindful of the "twin reasons" for the amendment's adoption: (1) "the States' fears that 'federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin,'" and (2) "the integrity retained by each State in our federal system," which includes the States' sovereignty from suit. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39, 130 L. Ed. 2d 245, 255 (1994) (quotations and citations omitted).

Although both state and local governments contribute to our school systems, there is no argument before us that any recovery in this matter

would come directly from our State treasury. Rather, the local school board is a corporate entity that can sue and be sued, N.C. Gen. Stat. §§ 115C-40, and our legislature has empowered local boards to waive sovereign immunity by obtaining insurance, N.C. Gen. Stat. § 115C-42 (2005), which the Johnston County board has done in this case. Moreover, as to the issue of maintaining the integrity of North Carolina within the federal system, we are convinced that suit against a local school board that performs "very important, though purely local functions," *see Turner, supra,* and that is its own corporate body separately liable from the State will not hinder our State's integrity within the federal system. Accordingly, we hold that a local school board is a "person" within the meaning of § 1983.

In regard to the state constitutional claims, the Board argues that plaintiffs cannot seek redress under the state constitution because "plaintiffs have an adequate state remedy. But for the Board's assertion of immunity, plaintiffs' cause of action in negligence would redress the complained of injury." Our Supreme Court has said, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). In considering whether an adequate state remedy exists, we consider whether, if any state remedy, if successful, would compensate a plaintiff for the same injury alleged in the direct constitutional claim. *Rousselo v. Starling*, 128 N.C. App. 439, 447, 495 S.E.2d 725, 731 (1998).

The Board's argument confuses the issues presented. Plaintiffs have claimed damages for *both* negligence and "intentional and arbitrary discrimination" by the Board against the tort claim. Plaintiffs seek to remedy the injury incurred by the alleged arbitrary and unequal application of the Board's immunity. There is no adequate remedy for such conduct in a negligence action or in any other state law cause of action. Accordingly, we hold that plaintiffs have no adequate state remedy and may proceed directly under the State constitution.

Having determined that a local school board is a person within the meaning of § 1983 and that plaintiffs have no adequate state remedy preventing them from proceeding under the State constitution, we consider whether judgment on the pleadings was otherwise appropriate. In *Dobrowolska v. Wall*, this Court held that summary judgment was inappropriate where there was no evidence in the record that the City of Greensboro applied a set criteria in deciding when to settle claims. 138 N.C. App. 1, 18, 530 S.E.2d 590, 602 (2000). Similarly, in this case, viewing the evidence in the light most favorable to the plaintiffs, there is a material issue of fact as to whether the Board applied a reasonable criteria to its evaluation of claims. *See Dobrowolska, supra.* Accordingly, judgment on the pleadings was inappropriate as to the constitutional claims. *See Davis, supra* ("The granting of judgment on the pleadings is [only] proper when there does not exist a genuine issue of material fact, and the only issues to be resolved are issues of law").

We additionally address the dissent's reliance on *Clayton v. Branson*, ___ N.C. App. ___, 613 S.E.2d 259 (2005). *Branson*, in pertinent part, dealt with the issue of whether a trial court properly denied a defendant's motion for *JNOV* regarding claims arising under 42 U.S.C. § 1983. This Court held that on the *Branson* facts the trial court erred in denying the defendant's motion for *JNOV*. The standard of review for a motion for *JNOV* and a motion for judgment on the pleadings are substantially different. When considering a motion for *JNOV*:

> all the evidence must be considered in the light most favorable to the nonmoving party. The nonmovant is given the benefit of every reasonable inference . . . from the evidence and all contradictions are resolved in the nonmovant's favor. If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for . . . judgment notwithstanding the verdict should be denied.

Branson, ___ N.C. App. ___, 613 S.E.2d at 263-64 (citations omitted). As we have previously stated, however, judgment on the pleadings is only proper when there are no genuine issues of material fact, and the only issues to be resolved are issues of law. *Davis, supra.* In this case, judgment on the pleadings was inappropriate because there are genuine issues of material fact presented by the pleadings as to whether defendants applied an appropriate, non-arbitrary criteria on an equal basis

to all claimants. Accordingly, we remand this issue to the trial court.

Reversed and remanded.

Judge HUDSON concurs.

Judge LEVINSON concurs in part and dissents in part with a separate opinion.

NO. COA04-1681

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO

Plaintiffs,

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS

ASSOCIATION, INCORPORATED; and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

LEVINSON, Judge concurring in part and dissenting in part.

I concur with the conclusion of the majority opinion that plaintiff's injuries did not fall within Exclusion 18 of the Coverage Agreement, and that the trial court's order must be reversed and remanded for entry of summary judgment in favor of defenants in this respect. However, I disagree with the conclusion that the constitutional claims survived defendants' Rule 12(c) motions, and therefore respectfully dissent from these portions of the majority opinion. Because it is unnecessary to do so, I make no comment on whether a local school board is a "person" within the meaning of 42 U.S.C. § 1983 (2005).

Unlike the majority, I conclude the trial court correctly granted defendants' N.C. Gen. Stat. § 1A-1, Rule 12(c) (2005) motion for judgment on the pleadings with respect to the constitutional claims, and would therefore affirm the trial court's order in this respect.

"'A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain.'" *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682, 360 S.E.2d 772, 780 (1987) (quoting *Ragsdale v.*

Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). "When a motion for judgment on the pleadings is made, the trial court is required to view the facts and permissible inferences in the light most favorable to the non-moving party, and all well pleaded factual allegations in the non-moving party's pleadings must be taken as true." *Burton v. Kenyon*, 46 N.C. App. 309, 310, 264 S.E.2d 808, 809 (1980).

A motion for judgment on the pleadings has some similarities to motions for dismissal for failure to state a claim for relief, under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005), and summary judgment under N.C. Gen. Stat. § 1A-1, Rule 54 (2005). *See Floraday v. Don Galloway Homes*, 340 N.C. 223, 224, 456 S.E.2d 303, 304 (1995) ("[P]ursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, defendant filed a motion for judgment on the pleadings, requesting dismissal of the action on the grounds that the complaint failed to state a claim upon which relief could be granted."); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment motions, the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence."). "The principal difference . . . is that a motion under Rule 12(c) . . . is properly made after the pleadings are closed while a motion under Rule 12(b)(6) must be made prior to or contemporaneously with the filing of the responsive pleading. *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988). Additionally, in addressing a Rule 12(c) motion, the trial court "may

consider . . . 'only the pleadings and exhibits which are attached and incorporated into the pleadings[.]'" *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 104, 598 S.E.2d 237, 240 (2004) (quoting *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996)) (citation omitted).

Plaintiffs herein sought damages "pursuant to 42 U.S.C. §§ 1983, 1988, the Fifth, the Fourteenth Amendments to the United States Constitution and Article I, [§] 19, of the Constitution of the State of North Carolina." I conclude that their complaint fails to set forth facts that, accepted as true and allowing all reasonable inferences from those facts, would entitle them to relief under any legal theory, or would demonstrate a genuine issue of material fact.

In reaching this conclusion, I am mindful that in considering a Rule 12(c) motion, "'[w]e are not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Good Hope Hosp. v. Dept. of Health*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)). "Though the trial court is obligated to take all of the allegations of the complaint as true in ruling upon the motion, it is elementary that the trial court must draw its own legal conclusions from those facts, and that it may draw conclusions which may differ from those advocated by plaintiffs." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). *See also, Lewis v.*

College, 23 N.C. App. 122, 127, 208 S.E.2d 404, 407 (1974) (upholding dismissal under Rule 12(b)(6) where alleged facts did not state ground for relief and "[o]ther portions of the complaint also contain allegations which, in our view, amount to no more than plaintiff's own unwarranted deductions or conclusions of law").

Thus, this Court's analysis of whether the trial court erred by dismissing plaintiffs' complaint requires us to distinguish between factual allegations and conclusions of law. "Findings of fact are statements of what happened in space and time." *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987). "Matters of judgment are not factual; they are conclusory and based ultimately on various factual considerations. . . . [Facts] can be objectively ascertained by one or more of the five senses or by mathematical calculation." *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988).

The majority cites the following allegations of plaintiffs' complaint in support of its conclusion that the trial court erred by dismissing plaintiffs' claim:

15. Upon information and belief, in the past, the Association, Trust Defendants and the Johnston County Board of Education could have raised the doctrine of immunity on many tort claims, but chose instead, for various reasons that will be proven at trial, to pay claims even in light of the immunity defense. Upon information and belief, the Association, Trust Defendants, in conjunction with the Johnston County Board of Education, would

examine each claim to see if the immunity doctrine could be raised. Upon information and belief, if the immunity doctrine would be raised, it was raised, but thereafter some claims were nevertheless paid. This disparate treatment of claimholders is prohibited by the United States and North Carolina Constitutions, as well as 42 U.S.C. § 1983.

. . .

44. At all times pertinent hereto, [defendants] . . . in claiming immunity as to the Plaintiffs' claims for personal injury and medical expenses, . . . have subjected these Plaintiffs to the deprivation of their equal protection and substantive due process rights under the United States Constitution, as enforced by 42 U.S.C. § 1983, and Article I, [§] 19 of the North Carolina Constitution.

45. These Plaintiffs have been denied due process and equal protection of the law as the Defendants have paid the property damage, but have asserted immunity in the remaining portion of Plaintiffs' claim, but have, upon information and belief, customarily waived it for similarly situated individuals who have been compensated for tort damages.

46. [Defendants'] policy and custom of paying some claims but not paying

others, when immunity could be raised in each one, has played a part in the violation of federal and state law. Additionally, the Defendants' conduct in this case, of paying the property damage, and assuming liability for the claim, and then refusing to pay the personal injury and medical expense portion of the claim, is a violation of Plaintiffs' federal and state constitutional rights, as a matter of law.

47. Upon information and belief, the [Defendants] have what amounts to be unbridled discretion to resolve claims filed with the local board of education.

48. As a result of the conduct of these Defendants, the Plaintiffs have been deprived of their right to recover for the bodily injury and medical expenses portion of the Ripellino claim.

49. The Fourteenth Amendment to the United States Constitution, Article I, [§] 19 of the North Carolina Constitution, and 42 U.S.C. § 1983 protect these Plaintiffs against intentional and arbitrary discrimination, being the conduct of the [defendants] as to these Plaintiffs.

50. As a proximate result of the Fifth and Fourteenth Amendments to the United

> States Constitution, Article I, [§] 19 of the Constitution of the State of North Carolina, and 42 U.S.C. § 1983 violations by [defendants], Plaintiffs are entitled to recover damages[.]

In reviewing the trial court's dismissal under Rule 12(c), I rely in part on this Court's recent opinion in *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259 (2005), *disc. review denied*, 360 N.C. 174, __ S.E.2d __ (filed 1 December 2005). The opinion in *Branson* sets out a comprehensive legal "roadmap" for review of constitutional claims based on a governmental unit's settlement policies and practices. Although (1) the instant case involves a Rule 12(c) motion while *Branson* reviewed the trial court's ruling on a motion for JNOV, and (2) different facts are present in each case, I conclude that *Branson* resolves certain legal issues raised in both cases.

Plaintiffs' factual allegations, considered singly or together, in conjunction with inferences logically drawn from these facts, do not state a claim for relief. Plaintiffs assert in paragraph No. 15 that defendants examined each claim to determine if the defense of governmental immunity would be available. Plaintiffs allege, in paragraphs Nos. 15, 45, and 46, that plaintiffs have paid damages to certain tort claimants, but would not pay plaintiffs' claim. And, in paragraphs Nos. 45 and 46, plaintiffs allege that defendants paid part of their claim, but did not pay all of it. These factual allegations, taken as true, do not give rise to liability as discussed below.

Plaintiffs further allege that by settling some claims defendants thereby "waived" the defense of governmental immunity, and that by refusing to offer plaintiffs a settlement, defendants were "raising" the defense of governmental immunity. Plaintiffs' characterization of defendants' actions is a conclusion of law, which the court is not required to accept as true, and is, in any event, simply an erroneous conclusion of law.

Branson observed that, as an affirmative defense, "governmental immunity cannot, by definition, be raised until there is a lawsuit to defend against." *Id.* at __, 613 S.E.2d at 268. On this basis, *Branson* held that "the execution of settlement contracts between a municipality and tort claimants do not constitute waivers of the affirmative defense of governmental immunity." *Id.* This reasoning is applicable to the instant case. Accordingly, plaintiffs' allegation, that defendants may have compensated other tort claimants, does not support an inference that defendants raised the defense of immunity in response to a lawsuit, nor that they subsequently waived the defense.

Plaintiffs herein also state that defendants have "unbridled discretion" to decide whether to settle claims. In other words, plaintiffs complain that defendants' authority over tort claims is not subject to regulation, and is constrained only by state and federal constitutional prohibitions on discrimination. Plaintiffs further assert that defendants' "unbridled discretion" violates their constitutional right to substantive and procedural

due process. Again, this is not a statement of fact, but is a legal conclusion that need not be accepted at face value.

Plaintiffs' position, that defendants' freedom to decide when to compensate claimants violates their constitutional rights, rests on the premise that there is a right to recover damages that cannot be abrogated without procedural due process, and that such right must be administered according to definite objective criteria. "However, § 1983 does not create constitutional rights, and is available only to enforce constitutional rights whose source may be identified[.]" *Id.* at __, 613 S.E.2d at 269. Consequently, plaintiffs' statement that defendants enjoy the discretion to decide when to settle claims does not support recovery unless plaintiffs also allege facts supporting an inference that they have a constitutionally protected legal right at issue.

As discussed in *Branson*, the right to procedural due process arises only upon the existence of a constitutionally protected property right and, absent a valid waiver of governmental immunity, a plaintiff has no "right" to recover damages from a governmental defendant. Therefore, plaintiffs clearly have no protected property right that would give rise to procedural due process rights:

> Plaintiff herein claims a constitutionally protected property interest in his right to recover damages from the city. . . . . As discussed above, absent a waiver of governmental immunity by the purchase of liability

> insurance, plaintiff is barred from maintaining a lawsuit against the city. As plaintiff has no right to maintain a suit against the city, under the facts set forth in this opinion, he cannot have a "constitutionally protected" property right to do so.

Id. at __, 613 S.E.2d at 270. Inasmuch as plaintiffs have no constitutionally protected right to recover from defendants, and therefore have no procedural due process rights, defendants' freedom to exercise discretion does not support an inference that plaintiffs rights to procedural due process are being violated:

> [I]t is undisputed that settlement offers, if any, are in the discretion of the city. Simple logic dictates that a party cannot have a right or entitlement to a benefit whose dispensation rests entirely in the discretion of the city[.] . . . Accordingly, the city's discretion to choose whether to settle with a claimant is not a constitutional violation of procedural due process[.]

Id.

Moreover, defendants' payment of damages to certain tort claimants does not constitute the granting of a "right" akin to a person's right to, *e.g.*, a license issued by a government zoning board or the receipt of welfare benefits. In each of these circumstances a governmental unit, although not

constitutionally required to do so, has extended a right to its citizens, subject to conditions articulated by statute or ordinance. However, in the present case, no "right" to compensation is identified. Where the existence of a right is clearly established, its administration may not depend on the whim or unlimited discretion of a government official. *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). However, *Dobrowolska* did not hold that, whenever a state or local governmental employee takes any action, makes a decision, or compensates a citizen for any loss, that a new "right" is thereby established, or that such decisions are *per se* unconstitutional if they are discretionary decisions by a government employee.

In the instant case, I conclude that plaintiffs failed to allege facts that would support an inference that they enjoyed a constitutionally protected right to compensation by defendants. The factual allegations of plaintiffs' complaint, reduced to their essentials, are that:

1. Defendants examine tort claims against them to ascertain the applicability of the affirmative defense of governmental immunity to the facts of the case.

2. Defendants customarily pay damages to some tort claimants, but not to all of them.

3. Defendants have the power to decide if and how they will offer a settlement to a tort claimant.

4. Defendants paid part of the damages asserted by plaintiffs, but not the whole claim.

These facts do not give rise to liability, and the remaining paragraphs from plaintiffs' complaint cited above consist of unwarranted legal conclusions that plaintiffs attempt to draw from these facts. For example, plaintiffs make the conclusory statements that defendants' conduct violates their rights to substantive due process, and that defendants violated their rights under the Equal Protection Clause by denying their claim but paying damages to "similarly situated" claimants.

It is true that appropriate factual allegations can support a claim of violation of Equal Protection rights, based on disparate treatment of similarly situated individuals:

> [M]ost laws differentiate in some fashion between classes of persons. The Equal Protection Clause . . . simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

Branson, __ N.C. App. __, 613 S.E.2d at 272 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12 (1992)). However, in the instant case, as in *Branson*, plaintiffs "[did] not identify any classification upon which [they were] denied equal protection[,] . . . [or allege] the use of any inherently suspect criteria, such as race, religion, or disability status." *Branson, id.* Indeed, plaintiffs wholly fail to

indicate, even in the most general terms, the kind of discrimination they allege, or the nature of the "relevant respects" in which other tort claimants were allegedly "similarly situated." Consequently, the allegations of their complaint provide no notice to defendants as to what actions or transactions are allegedly discriminatory. Do plaintiffs mean to suggest that defendants only compensate tort claimants if they are from a particular part of the county; are school employees; belong to a particular political party; are of a certain race or gender; go to church with a school board member; or only if the damages claimed are below a certain amount? Because plaintiffs fail to allege any facts, there is no way to know.

The standard for sufficiency of a complaint under our theory of "notice pleading" has been stated as follows:

> In order for plaintiffs' complaint to have withstood defendant's motion to dismiss, the complaint must . . . provide defendant sufficient notice of the conduct on which the claim is based to enable defendant to respond and prepare for trial[.] . . . For the purpose of ruling on a motion to dismiss . . . conclusions of law or unwarranted deductions of fact are not admitted. Under the notice theory of pleadings, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial[.]

Hill v. Perkins, 84 N.C. App. 644, 647, 353 S.E.2d 686, 688 (1987) (emphasis added) (citations omitted). "'In reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial.'" *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002) (quoting *Brandis v. Lightmotive Fatman, Inc.*, 115 N.C. App. 59, 62, 443 S.E.2d 887, 888 (1994)).

In the instant case, the "fallacy with plaintiffs' . . . complaint, is that statements of law . . . substitute for alleging sufficient facts from which it may be determined what liability forming conduct is being complained of and what injury plaintiffs have suffered." *Hill,* 84 N.C. App. at 648, 353 S.E.2d at 689. I conclude that plaintiffs failed to state a claim for violation of their equal protection rights, even under the liberal standards of notice pleading.

Finally, I respectfully observe that the majority opinion's statement that the "allegations [in the complaint] amount to more than 'conclusory, unwarranted deductions of fact, or unreasonable inferences'" fails to meet the legal implications of *Branson*. I conclude that, under *Branson* and cases cited therein, plaintiffs failed to allege facts that, if proved, would entitle them to relief under their constitutional claims. Accordingly, I would uphold the trial court's dismissal of plaintiffs' constitutional claims.

COURT OF APPEALS OF NORTH CAROLINA

NO. COA02-1309

Filed: 17 June 2003

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO, Plaintiffs v. THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION, Defendants

1. Discovery--deposition of witness--motion for continuance

The trial court did not err in a personal injury case by denying plaintiffs' motion for a continuance to depose a witness, because plaintiffs failed to show that new information relevant to the limited issue presented in the summary judgment hearing regarding immunity and waiver of immunity would be discovered.

2. Immunity--sovereign--local school board--purchase of insurance--waiver

Although the trial court did not err in a personal injury case by granting summary judgment in favor of defendants on the ground of sovereign immunity for claims less than $100,000 and greater than $1,000,000 based on the fact that defendant local school board's participation in the North Carolina School Boards Trust (NCSBT) did not qualify as a purchase of insurance under N.C.G.S. § 115C-42 causing defendant to waive its immunity, the trial court erred by granting summary judgment for claims in excess of $100,000 and under $1,000,000 pursuant to excess insurance coverage purchased by defendant local board of education.

3. Immunity--sovereign--local school board--estoppel

Defendant local board of education is not estopped from claiming sovereign immunity in a personal injury case even though defendant paid plaintiffs for property damage, because: (1) the

General Assembly determines when and under what circumstances the State and its political subdivisions may be sued; and (2) the concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule.

4. Civil Rights--section 1983 claim--sovereign immunity defense inapplicable

The trial court erred in a personal injury case by granting summary judgment in favor of defendant local board of education on plaintiffs' § 1983 claim, because defendant may not assert a defense of sovereign immunity against plaintiffs' constitutional § 1983 claim even though plaintiffs may not be entitled to monetary relief under this section against defendant on grounds other than sovereign immunity.

5. Damages and Remedies--punitive damages--governmental entity immune

Defendant local board of education is immune from a claim for punitive damages because the board is a governmental entity.

6. Civil Procedure--summary judgment--contingent upon claims against other defendants

The trial court did not err in a personal injury case by granting summary judgment in favor of the trust defendants when those defendants did not move for summary judgment and did not participate in the summary judgment hearing because plaintiffs'

claims against those defendants are related to and contingent upon the claims against defendant local board of education.

Appeal by plaintiffs from judgment entered 15 March 2002 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 15 May 2003.

Mast, Schulz, Mast, Mills, Stem & Johnson, P.A., by Bradley N. Schulz and Don R. Wells, for plaintiffs.

Yates, McLamb & Weyher, LLP, by Barbara B. Weyher, for the Trust defendants.

Cranfill, Sumner & Hartzog, LLP, by Stephanie Hutchins Autry, for Johnston County Board of Education.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson, for North Carolina Council of School Attorneys, amicus curiae.

Ferguson Stein Chambers Wallas Adkins Gresham & Sumter, P.A., by S. Luke Largess, for North Carolina Academy of Trial Lawyers, amicus curiae.

TYSON, Judge.

Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino ("Nicole") (collectively "plaintiffs") appeal from an entry of summary judgment in favor

of all defendants. We affirm in part, reverse in part, and remand.

I. Background

At the end of classes on 9 March 1998, Nicole was departing from Clayton High School in Johnston County in her parent's vehicle. A traffic control gate owned by the Johnston County Board of Education ("Board") swung closed, struck the vehicle, and injured Nicole. In October 1998, the Ripellinos were paid $2,153.18 for property damage. The Board refused to pay medical expenses or other compensation.

On 26 March 2001 and amended on 6 April 2001, plaintiffs filed suit against the Board, and The North Carolina School Boards Association, Inc., and The North Carolina School Board Trust and its self-funded trusts ("trust defendants"). Plaintiffs alleged (1) a negligent personal injury claim against the Board on the part of Nicole, (2) a medical expenses claim on the part of Nicole's parents against the Board, (3) declaratory judgment that immunity had been waived through (a) participation in the trust and (b) the payment of property damages, (4) unfair and deceptive trade practices against all defendants, (5) 42 U.S.C. § 1983 claim ("§ 1983 claim") and constitutional claims against all defendants, and (6) punitive damages.

Upon motion of the Board, the trial court bifurcated the trial allowing the issues of whether the Board was immune from suit and whether the Board had waived sovereign immunity to be resolved

while the other claims were stayed. Based upon discovery affidavits, plaintiffs requested the deposition of Tom Davis.

On 19 February 2002, the trial court held a hearing regarding plaintiffs' request to depose Davis. At the end of the hearing, the trial court orally ruled that because the trial was bifurcated and there was nothing new to which Davis would be able to testify regarding immunity, plaintiffs would not be permitted to depose Davis.

The hearing on the Board's motion for summary judgment was continued until 8 March 2002. After the hearing, the trial court granted summary judgment in favor of all defendants on all claims. Plaintiffs appeal from both the denial of the request for deposition of Davis and the grant of summary judgment to all defendants on all issues.

II. Issues

Plaintiffs contend the trial court erred in (1) preventing plaintiffs from deposing Davis, (2) granting summary judgment to the Board when the Board waived immunity by purchasing insurance, (3) granting summary judgment for the Board when the Board was estopped from denying payment of the claim, (4) granting summary judgment on the constitutional issues and the § 1983 claims, and (5) granting summary judgment to the Trust defendants.

III. Deposition of Davis

[1] Plaintiffs contend the trial court erred in denying their request to depose Davis. We disagree.

Rule 56 of the Rules of Civil Procedure provides:

> (f) When affidavits are unavailable. -- Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. Gen. Stat. § 1A-1, Rule 56(f). To prevail on a Rule 56(f) motion, the moving party has the burden of showing why additional discovery is necessary and how that discovery will create a genuine issue of material fact. *See e.g.*, *Becerra v. Asher*, 105 F.3d 1042, 1048, *cert. denied*, 522 U.S. 824, 139 L. Ed. 2d 40 (1997).

Because of the previously bifurcated discovery and trial, the only issues open for discovery and the summary judgment hearing were immunity and waiver of immunity. On appeal, plaintiffs contend that "Davis' deposition is necessary to determine the nature of the Board's interaction with Trust Defendants, as well as the arbitrary payment by the

Board of claims." The Board had already provided through discovery a list of claims paid by the Board and that no claims had been paid by the Trust. The trial court did not err in denying plaintiffs' motion for a continuance to depose Davis when they failed to show that new information relevant to the limited issue presented in the summary judgment hearing would be discovered. This assignment of error is overruled.

IV. Sovereign Immunity

A. Non-Constitutional Claims

"As a general rule, the doctrine of governmental, or sovereign immunity bars action against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Herring ex rel. Marshall v. Winston-Salem/Forsyth Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461, *disc. rev. denied*, 352 N.C. 673, 545 S.E.2d 423 (2000) (citations omitted). "A local board of education is immune from suit and may not be liable in a tort action unless the Board has duly waived its governmental immunity." *Hallman v. Charlotte-Mecklenburg Bd. Of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996). The General Assembly has provided a means for a local board of education to waive immunity through N.C. Gen. Stat. § 115C-42 (2001), which provides in part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its

> governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

The statute expressly defines how a local board may procure insurance and from whom it may be procured:

> Any contract of insurance purchased pursuant to this section shall be *issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance* and shall by its terms adequately insure the local board of education against liability for damages by reason of death or injury to person or property proximately caused by the negligent act or torts of the agents and employees of said board of education or the agents and employees of a particular school in a local

> administrative unit when acting within the scope of their authority.

(Emphasis supplied). N.C. Gen. Stat. § 115C-42.

N.C. Gen. Stat. § 115C-42 is the exclusive means of a local board of education to waive immunity. *Lucas v. Swain County Bd. of Educ.*, 154 N.C. App. 357, 361, 573 S.E.2d 538, 541 (2002). "The Courts of North Carolina have applied a rule of strict construction to statutes authorizing waiver of sovereign immunity." *Hallman*, 124 N.C. App. at 438, 477 S.E.2d at 181. As a local board of education, the Board is immune from suit in a tort action unless it waived immunity.

1. Participation in the Trust

[2] Plaintiffs argue the Board's participation in the North Carolina School Boards Trust ("NCSBT") qualified as a purchase of insurance under N.C. Gen. Stat. § 115C-42 and waived the Board's immunity. We disagree.

Our Court has recently determined that "the only way a plaintiff can establish that a board has waived its immunity is by showing the contract of insurance was issued by (1) an entity licensed and authorized to execute insurance contracts in this State; or (2) a qualified insurer as determined by the Department of Insurance." *Lucas*, 154 N.C. App. at 361, 573 S.E.2d at 541. Plaintiffs have failed to forecast evidence that NCSBT meets either of these requirements.

The NCSBT provides:

> local boards of education the opportunity to budget funds for the purpose of paying all or part of a Claim made or any civil judgment entered against any of its members or employees or former members or employees, when such a Claim is made or such judgment is rendered as Damages on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope or their duties as members of the local board of education or as employees. NCSBT does not provide any coverage for any Claim which could not be paid by a local board of education pursuant to G.S.115C-43(b) or successor statute. The NCSBT Coverage Agreement is not a contract of insurance by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance. Therefore, the NCSBT Coverage Agreement expressly is not considered a waiver of governmental immunity as provided in G.S.115C-42.

The policy states that the fund provides general liability coverage and errors and omissions coverage of $100,000 for each claim made and excess insurance limits of $900,000 for each claim made

totaling $1,000,000 coverage. Excess insurance is defined as "insurance purchased by NCSBT that provides coverage over and above the Fund limits as shown in the Declarations." To the extent the excess insurance policy provides coverage, the Board waived immunity.

The trial court erred in granting summary judgment on the grounds of sovereign immunity for claims in excess of $100,000 and under $1,000,000 pursuant to the excess insurance coverage. The trial court did not err in granting summary judgment in favor of the Board for claims less than $100,000 and greater than $1,000,000.

2. Estoppel

[3] Plaintiffs contend the Board is estopped from claiming governmental immunity when the Board paid plaintiffs for property damage. We disagree.

A waiver of sovereign immunity must be established by the General Assembly. *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001). "Our Supreme Court has stated that 'it is for the General Assembly to determine when and under what circumstances the State [and its political subdivisions] may be sued." *Id.* (quoting *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625). "The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body." *Id.*

If a court could estop the Board from asserting an otherwise valid defense of sovereign immunity, "then, effectively, that court, rather than the General Assembly, would be waiving [the Board's] sovereign immunity." *Id.* at 347, 556 S.E.2d at 45.

B. Constitutional Claims

[4] Plaintiffs contends the trial court erred in granting summary judgment in favor of the Board on the § 1983 claim. We agree.

Section 1983 provides "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress." 42 U.S.C. § 1983 (2000). Our Supreme Court has held that the State of North Carolina and its agencies are not "persons" within the meaning of section 1983 and could not be sued for monetary damages under that statute. *Corum v. University of North Carolina*, 330 N.C. 761, 789, 413 S.E.2d 276, 293, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Municipalities are considered persons and subject to suit under § 1983 for monetary damages.

The United States Supreme Court has held that the legislature intended for "municipalities and other local government units to be included among

those persons to whom § 1983 applies." *Monell v. Department of Social Servs.*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635 (1978). "Local governing bodies ... can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*

"A county may not claim sovereign immunity as a defense to a section 1983 claim if the violation of federal rights is caused by the county's official policy, such as the implementation of an ordinance or a decision officially adopted by the board of county commissioners." *Peverall v. County of Alamance*, 154 N.C. App. 426, 432, 573 S.E.2d 517, 521 (2002).

Plaintiffs alleged that the Board, the local governing body for the school system, has unconstitutionally paid some claims while asserting immunity on others in violation of plaintiffs' equal protection and due process rights. Plaintiffs showed through discovery that claims had been paid by the Board, including partial payment to plaintiffs.

The Board may not assert a defense of sovereign immunity against plaintiffs' constitutional § 1983 claims. We note that plaintiffs may not be entitled to monetary relief pursuant to section 1983 against defendant on grounds other than sovereign immunity. *Id.* (citing *Messick v. Catawba County*, 110 N.C. App. 707, 713-14, 431 S.E.2d 489, 493, *disc. rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993) (holding that, because a county is not a "person" for

purposes of a section 1983 claim, it cannot be sued where the remedy sought is monetary damages)). As this appeal is limited to issues of sovereign immunity, we do not address the merits of such an argument. The trial court erred in granting summary judgment in favor of defendants on the § 1983 and constitutional claim.

C. Punitive Damages

[5] Plaintiffs asserted a claim of punitive damages against defendants. "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Long v. City of Charlotte*, 306 N.C. 187, 207, 293 S.E.2d 101, 114 (1982). Usually, the individual wrongdoer himself is made to suffer for his conduct. Here, it is the governmental entity. *Id.*

In *Long*, our Supreme Court held that public policy, in the absence of statutory provisions to the contrary, provides that municipal corporations are immune from punitive damages. *Id.* We find the rational in *Long* persuasive, and hold that the Board, as a governmental entity, is immune from punitive damages.

V. Trust Defendants

[6] Plaintiffs contend the trial court erred in granting summary judgment to the trust defendants when the trust defendants did not move for

summary judgment and did not participate in the summary judgment hearing.

Plaintiffs' claims against the trust defendants are related to and contingent upon the claims against the Board. To the extent the trial court properly granted summary judgment in favor of the Board, the claims against the trust defendants were also properly granted.

VII. Conclusion

The trial court erred in granting summary judgment on the grounds of immunity as to the constitutional claims against all defendants and as to the non-constitutional claims to the extent there was excess liability insurance for claims between $100,000 to $1,000,000 dollars. The trial court properly granted summary judgment to defendants on claims of less than $100,000 and for punitive damages.

Affirmed in part, reversed in part and remanded.

Judges MCGEE and CALABRIA concur.

STATE OF NORTH CAROLINA
JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CVS 609

[FILED March 15, 2002]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED

AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

THIS CAUSE COMING ON TO BE HEARD upon motion of the defendant, The Johnston County Board of Education; and it appearing to the Court from the pleadings, Answers to Interrogatories, Request for Production of Documents and Request for Admissions, and the briefs and other materials presented to the Court, together with the arguments of counsel and the issues raised by counsel during argument, that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law as to all claims against them;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs' claims against the defendants be, and they therefore are, dismissed.

This the /15/ day of March, 2002.

/s/Knox V. Jenkins, Jr.
The Honorable Knox V. Jenkins, Jr.
Superior Court Judge Presiding

No. 180A06 ELEVEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

(Ripellino v Board of Education)

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO

v

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH

CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPOF ED; AND THE JOHNSTON COUNTY BO RD OF EDUCATION

From NC Court of Appeals
(COA04-1681)
From Johnston
(01CVS609)

ORDER

Upon consideration of the petition for discretionary review, filed by Defendant (N.C. School Boards Association, et al.) on the 11th day of April 2006 in this matter pursuant to G.S. 7A-31 and the Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the petition for discretionary review as to additional issues is

> **"Allowed by order of the Court in conference, this the 29th day of June 2006.**
>
> **s/ Timmons-Goodson, J.**
> **For the Court"**

Accordingly, the new brief of the Defendant (N.C. School Boards Association, et al.) shall be filed with this Court not more than 30 days from the date of certification of this order.

No. 180A06 ELEVEN-B DISTRICT

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of June 2006.

/s/ Christie Speir Cameron
Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Ms. Stephanie H. Autry, Attorney at Law, For Johnston County Bd. of Ed.
Ms. Rachel B. Esposito, Attorney at Law, for Johnston County Bd. of Ed.
Ms. Meredith T. Black, Attorney at Law, for Johnston County Bd. of Ed.
Mr. James R. Lawrence, Jr., Attorney at Law, For Johnston County Bd. of Ed. (by E-Mail)
Mr. Bradley N. Schulz, Attorney at Law, For Michael Ripellino, et al (by E-Mail)
Ms. Barbara B. Weyher, Attorney at Law, For School Boards Asso., et al (by E-Mail)
Mr. T. Carlton Younger, III, Attorney at Law, for School Boards, et al
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

No. 180A06 ELEVEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

[FILED June 30, 2006]

(Ripellino v Board of Education)

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO

v

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A

DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; AND THE JOHNSTON COUNTY BOARD OF EDUCATION

From NC Court of Appeals
(COA04-1681)
From Johnston
(01CVS609)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendant (Johnston County Board of Education) on the 6th day of April 2006 in this matter pursuant to G.S. 7A-30 (substantial constitutional question), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the notice of appeal is

> "Dismissed Ex Mero Motu by order of the Court in conference, this the 29th day of June 2006.
>
> ***s/* Timmons-Goodson, J.**
> **For the Court"**

Upon consideration of the petition for discretionary review, filed by Defendant (Johnston County Board of Education) on the 6th day of April 2006 in this matter pursuant to G.S. 7A-31 and the Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in

the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the petition for discretionary review as to additional issues is

> "Allowed by order of the Court in conference, this the 29th day of June 2006.
>
> **s/, J.**
> **For the Court"**

Accordingly, the new brief of the Defendant (Johnston County Board of Education) shall be filed with this Court not more than 30 days from the date of certification of this order.

No. 180A06 ELEVEN-B DISTRICT

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of June 2006.

s/CHRISTIE S CAMERON
Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Ms. Stephanie H. Autry, Attorney at Law, For Johnston County Bd. of Ed.
Ms. Rachel B. Esposlto, Attorney at Law, for Johnston County Bd. of Ed.
Ms. Meredith T. Black, Attorney at Law, for Johnston County Bd. of Ed.
Mr. James R. Lawrence, Jr., Attorney at Law, For Johnston County Bd. of Ed. (by E-Mail)
Mr. Bradley N. Schulz, Attorney at Law, For Michael Rlpelllno, et al (by E-Mail)
Ms. Barbara B. Weyher, Attorney at Law, For School Boards Asso., et al (by E-Mail)
Mr. T. Carlton Younger, III, Attorney at Law, for School Boards, et al
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

STATE OF NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CVS 609

[FILED September 9, 2004]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF- FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA

SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by,.THENORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS FOR TRUST DEFENDANTS

THIS CAUSE COMING ON TO BE HEARD upon motion of the defendants denominated in the Complaint as, "The North Carolina School Boards Association, Incorporated; North Carolina School Boards Trust, a division and/or Department of, created and administered by, The North Carolina School Boards Association, Incorporated; 1982 North Carolina School Boards Association Self-Funded Trust Fund, a division and/or department of, created and administered by, The North Carolina School Boards Association, Incorporated; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, a division and/or department of, created and Administered by, The North Carolina School Boards Association, Incorporated; 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund, a division and/or department of, created and administered by, The North Carolina School Boards Association, Incorporated" (collectively "Trust Defendants"), for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedures as to all non-constitutional

claims and for judgment on the pleadings pursuant to Rule 12 (c) of the North Carolina Rules of Civil Procedures as to all claims arising under 42 U.S.C. § 1983 and the North Carolina Constitution (hereinafter, "the constitutional claims");

AND IT APPEARING to the Court from the entire record, including the pleadings, discovery, affidavits, and the briefs and other materials presented to the Court, together with the arguments of counsel and the issues raised by counsel during argument, that there is no genuine issue as to any material fact as to the non-constitutional claims and that the Trust Defendants are entitled to judgment as a matter of law as to all non-constitutional claims against them pursuant to Rule 56;

AND IT FURTHER APPEARING to the Court from the pleadings and the briefs and arguments of counsel that there is no genuine issue as to any material fact as to the constitutional claims and that the Trust Defendants are entitled to judgment on the pleadings as a matter of law as to the constitutional claims against them pursuant to Rule 12 (c);

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs' non-constitutional claims against the Trust Defendants be, and they therefore are, dismissed with prejudice pursuant to Rule 56 of the North Carolina Rules of Civil Procedure and that the plaintiffs' constitutional claims against the Trust Defendants be, and they therefore are, dismissed with prejudice pursuant to

Rule 12 (c) of the North Carolina Rules of Civil Procedure.

This the /8/ day of /September/, 2004.

/s/Knox V. Jenkins, Jr.
The Honorable Knox V. Jenkins, Jr.
Superior Court Judge Presiding

STATE OF NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CVS 609

[FILED September 3, 2004]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-

FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS FOR DEFENDANT JOHNSTON COUNTY BOARD OF EDUCATION

THIS CAUSE COMING ON TO BE HEARD upon motion of the defendant, The Johnston County Board of Education, for summary judgment pursuant to Rule 56 as to all non-constitutional claims and for judgment on the pleadings pursuant to Rule 12 (c) as to all claims arising under 42 U.S.C. § 1983 and the North Carolina Constitution (hereinafter, "the constitutional claims");

AND IT APPEARING to the Court from the entire record, including the pleadings, answers to discovery, and the briefs, affidavits and other materials presented to the Court, together with the arguments of counsel and the issues raised by counsel during "argument, that there is no genuine issue as to any material fact as to the non-constitutional claims and that the defendant, Johnston County Board of Education, is entitled to judgment as a matter of law as to all non-constitutional claims against it pursuant to Rule 56;

AND IT FURTHER APPEARING to the Court from the pleadings and the briefs and arguments of counsel that there is no genuine issue as to any material fact as to the constitutional claims and that the defendant, Johnston County Board of Education, is entitled to judgment on the pleadings as a matter of law as to the constitutional claims against it pursuant to Rule 12 (c);

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs' non-constitutional claims against the defendant, Johnston County Board of Education be, and they therefore are, dismissed with prejudice pursuant to Rule 56 and that the plaintiffs' constitutional claims against the defendant, Johnston County Board of Education be, and they therefore are, dismissed with prejudice pursuant to Rule 12 (c).

This the /3rd/ day of /Sept/, 2004.

/s/Knox V. Jenkins, Jr.
The Honorable Know V. Jenkins, Jr.
Superior Court Judge Presiding

Supreme Court of North Carolina

No. 526P03.

[FILED] Feb. 5, 2004.

Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, Incorporated; North Carolina School Boards Trust, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1982 North Carolina School Boards Association Self-Funded Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; and the Johnston County Board of Education.

ORDER

Upon consideration of the petition filed by Plaintiffs on the 18th day of September 2003 in this matter for

a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals: "Denied by order of the Court in conference, this the 5th day of February 2004."

Upon consideration of the petition filed by Plaintiffs on the 27th day of October 2003 in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th day of February 2004."

NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 01 CVS 609

[FILED April 11, 2002]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, and NICOLE RIPELLINO,

Plaintiff,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATIONS, INCORPORATED, NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of created administered by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED **1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/ GENERAL LIABILITY TRUST FUND,** a division and/or department of, created and administered by THE NORTH CAROLINA SCHOOLS BOARDS ASSOCIATION, INCORPORATED; **1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO-INLAND MARINE TRUST FUND,** a division and/or department of created and administered by by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION

INCORPORATED, and **THE JOHNSTON COUNTY BOARD OF EDUCATION,**

Defendants.

ORDER

(OTHR)

THIS CAUSE, coming on to be heard and being heard before the undersigned Honorable Superior Judge presiding over the February 19, 2002 term of the Superior Court of Johnston County on plaintiff's Motion To Continue the Summary Judgment hearing, so as to be allowed to take the deposition of Tom Davis; the plaintiffs were present in court represented by their attorney of record, Bradley N. Schulz; the Johnston County Board of Education was represented by its attorneys of record Stephanie Autry and James Lawrence;

And the court after hearing arguments from counsel indicated to counsel that the undersigned was heavily involved with the redistricting matter; the court also heard arguments from plaintiffs that the Affidavit of Tom Davis had been filed in support of the School Board's Motion For Summary Judgment, and due to the allegations as contained in paragraphs 7 & 8, the plaintiffs would like to take his deposition pursuant to Rule 56; after reviewing the file and hearing arguments of counsel, the court determined that the Summary Judgment Hearing should be continued and that the plaintiffs should not be allowed to take the deposition of Mr. Tom Davis

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Johnston County Board of Education's Motion For Summary Judgment shall be heard by the undersigned on Friday, March 8, 2002, at 10:00 a.m., and that the plaintiffs are prohibited from taking the deposition of Mr Tom Davis.

Entered in open court the 19th day of February, 2002, and signed this the /11/ day of April, 2002.

/s/Knox V. Jenkins, Jr.
Hon. Knox V. Jenkins, Jr.
Superior Court Judge Presiding

STATE OF NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 01 CVS 609

[FILED April 6, 2001]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH

CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

PLAINTIFF'S FIRST AMENDED COMPLAINT

NOW COME Plaintiffs, by and through counsel, and pursuant to Rule 15 of the North Carolina Rules of Civil Procedure, and prior to the filing of any responsive pleading by any defendant, file herewith their First Amended Complaint and allege and state as follows:

1. The Plaintiffs, Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino are citizens and residents of Johnston County, North Carolina, and were citizens and residents of the county at the times complained of herein.

2. The Defendant, the Johnston County Board of Education, is a separate body politic, in the County of Johnston, charged with the statutory duty of constructing schools, maintaining schools and providing a safe environment for the education of children, and their travel to and from the school facility. The Johnston County Board of Education

operates a facility known as Clayton High School in Clayton, North Carolina, and specifically built, erected and maintains the gates located at the western exit of the school, High School Drive, the general area where the accident involving Nicole Ripellino took place.

3. The North Carolina School Boards Association, Incorporated (hereinafter "Association"), is a North Carolina not-for-profit corporation authorized by the North Carolina Secretary of State, with its principal office located in Raleigh, Wake County, North Carolina. Its members include many local school boards, including the Defendant, the Johnston County Board of Education.

4. In or about 1982, The North Carolina School Boards Association, Incorporated, implemented a division and/or entity known as the Defendant, North Carolina School Boards Trust, which provided workers' compensation and other coverage, through a self-funded trust fund protected by excess insurance. This Defendant is a division and/or department of, created and administered by, The North Carolina School Boards Association, Incorporated, and is involved with funding and administering the 1982, 1986 and 1997 Self-Funded Trusts referenced below.

5. The Defendant, 1982 North Carolina School Boards Association Self-Funded Trust Fund, was created by The North Carolina School Boards Association, Incorporated, in or about 1982, as its first self-funded trust fund, established to provide

workers' compensation coverage for locally and federally funded school employees through a self-funded trust fund protected by excess insurance. Upon information and belief, this Defendant is a division and/or department of, created and administered by, The North Carolina School Boards Association, Incorporated.

6. The Defendant, 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund was created by The North Carolina School Boards Association, Incorporated, in or about 1986, as its second self-funded trust fund, established to provide errors and omissions and general liability coverage for school districts, local boards of education, school board members, school employees, and school volunteers. Upon information and belief, this Defendant is a division and/or department of, created and administered by, The North Carolina School Boards Association, Incorporated.

7. The Defendant, 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund is the third fund established by the Defendant, The North Carolina School Boards Association, Incorporated, and was established to provide coverage for, among other things, school-owned vehicles, including coverage for yellow school buses for exposures not covered by the State Tort Claims Act. Upon information and belief, this Defendant is a division and/or department of, created and administered by, The North Carolina School Boards Association, Incorporated.

8. The four trust defendants, as alleged in the previous paragraphs 4-7, have the purpose to provide payment to claimants, such asthe Plaintiffs herein, for damages caused while on the premises of the local school boards, and will hereinafter be referred to collectively as the "Trust Defendants."

9. The Defendant, The Johnston County Board of Education, participates in all four trusts through The North Carolina School Boards Association, Incorporated.

10. As is more fully set forth below, Defendant, The Johnston County Board of Education is involved with the payment of claims by the Association, as claims are normally reported to the school board, communicated by the Board to the Association, and the negotiation and settlement of claims handled by these entities is a joint effort of all Defendants involved in this litigation.

11. The Association and the four Trust Defendants are not governmental risk-pools, as the same are prohibited by N.C.G.S. § 115C-142, and the interpreting case law.

12. In regard to the Ripellino claim, further described below, the Association, the four Trust Defendants, and The Johnston County Board of Education were agents of each other for handling of this claim, acted in concert, and also acted in a joint enterprise to handle the claim. Specifically, the claim was first reported to The Johnston County Board of Education and thereafter, medical records and bills were forwarded to Mr. James Causby,

Superintendent of the Board of Education. Upon information and belief, Superintendent Causby or his designee(s) forwarded these bills and records to agents or employees of the Association or the Trust Defendants and communicated with them regarding the same. Additionally, the Association has established a website on the Internet, where authorized members of the Association, including employees of The Johnston County Board of Education, can log in for purposes of the evaluation and handling of claims.

13. Upon information, and belief, the Association and Trust Defendants have approximately thirteen claims handlers in Raleigh, and service claims throughout the State. Upon information and belief, due to the small number of claims handlers, the Association and Trust Defendants must rely heavily on local input relating to the evaluation and payment of claims, including the involvement of various agents or employees of The Johnston County Board of Education in the Ripellino claim.

14. At all times pertinent to this matter, Superintendent Causby was an agent of, or acting in concert with, with the Association, Trust Defendants and the Johnston County Board of Education in regard to the Ripellino claim.

15. Upon information and belief, in the past, the Association, Trust Defendants, and The Johnston County Board of Education could have raised the doctrine of immunity on many tort claims, but chose instead, for various reasons that

will be proven at trial, to pay claims even in light of the immunity defense. Upon information and belief, the Association and Trust Defendants, in conjunction with The Johnston County Board of Education, would examine each claim to see if the immunity doctrine could be raised. Upon information and belief, if the immunity doctrine could be raised, it was raised, but thereafter some claims were nevertheless paid. This disparate treatment of claimholders is prohibited by the United States and North Carolina Constitutions, as well as 42 U.S.C. § 1983.

16. At all times relevant hereto, Defendant, The Johnston County Board of Education, did operate and maintain Clayton High School, a high school educational facility in Johnston County. The Johnston County Board of Education further maintained High School Drive, which is a private vehicular area located on the western portion of the Clayton High School property, said vehicle area being an area of ingress/egress to the high school for vehicular traffic. High School Drive is controlled by gates constructed by, erected by, and maintained by The Johnston County Board of Education to control traffic access on High School Drive. The Johnston County Board of Education has a duty to regularly inspect and maintain the gates at issue.

17. At all times relevant hereto, the gates at issue are of a two-piece construction, attached to poles each holding one portion of the gate, and said poles were placed inside the curb line on the main travel portion of High School Drive.

18. At all times relevant hereto, when the gates were in an open position, The Johnston County Board of Education provided no means by which to hold or secure the gates in this open position, substantially increasing the risk that either of the two gates would swing closed unexpectedly, by wind or any other type cause.

19. Prior to and at the time of the accident herein alleged, the gates on High School Drive were in a state of disrepair, with their poles being pitched too much to the inside, creating a hazard that the gate would close into the path of a vehicle; the risk of the gates closing unexpectedly was enhanced by the fact that the gates were not secured while in an open position.

20. At all times relevant hereto, the Plaintiff Nicole Ripellino was an invitee on the premises of Clayton High School on High School Drive, being an enrolled student at Clayton High School in good standing.

FIRST CLAIM FOR RELIEF - NEGLIGENCE

21. The allegations of all preceding paragraphs are incorporated by reference as though fully alleged herein.

22. On or about Monday, March 9, 1998, at approximately 3:14 p.m., the Plaintiff, Nicole Ripellino, was attempting to depart Clayton High School at the end of classes for the day. At the time in question, Nicole Ripellino was operating a 1989 Plymouth four-door vehicle, owned by Michael G.

Ripellino, Nicole's father, and provided by him for family member use, including Nicole. Nicole Ripellino was traveling at the time alleged in a westerly direction along High School Drive, on the property of Clayton High School. Johnston County Board of Education, when one of the traffic control gates unexpectedly and without warning swung closed, crashing through the windshield of the Ripellino vehicle, striking the Plaintiff and throwing her about the vehicle. The gate at issue was owned by The Johnston County Board of Education.

23. The sole cause of Plaintiff's injury was the closing of the gate.

24. As a result of this defective gate, said area was dangerous to the public, as well as to all students such as Nicole and all faculty who were attempting to enter or leave the high school property. The Johnston County Board of Education, through its agents and/or employees, knew or should have known of the above-described condition and of the attendant danger to the public and students and faculty and had time to have corrected or taken other action regarding said dangerous condition prior to the accident herein alleged. Upon information and belief, vehicles had struck the gates in the past, due to the fact that they were not secured and would close unexpectedly.

25. The Johnston County Board of Education was on actual and/or constructive notice about the gates and their defective condition, and although on notice of problems, and as a result of this accident, has done nothing further to correct

this dangerous condition. The gates continue to remain open at many times, unattended, and not secured in the open position. Although chains and a lock have since the accident been added to the gates, the chains are not latched, the locks are not secured, and vehicles have hit the same.

26. The Defendant, The Johnston County Board of Education, through its agents and/or employees, was negligent in that:

a. it failed to keep and maintain the gates on High School Drive at Clayton High School, in a reasonably safe condition;

b. it failed to keep and maintain the gates at issue in a manner consistent with various safety and design guidelines for gates such as the gates at issue;

c. it created and/or maintained a dangerous condition and obstruction on High School Drive by the placement of the poles within the curb line and the specific gates at issue, when it knew or should have known that said dangerous condition and obstruction existed;

d. it failed to exercise reasonable care in the design, construction, maintenance and/or repair of said gates on High School Drive, Clayton High School;

e. it failed to give any warning to the pubiic, or to the Plaintiff or any other

similarly situated whatsoever of the dangerous conditions existing with said gates;

f. it failed to reasonably inspect said gates and correct the dangerous condition;

g. it failed to take reasonable action regarding the dangerous condition existing there and to keep High School Drive free of unnecessary and dangerous conditions;

h. it failed to correct the pitch of the poles securing the gates at issue, and said pitch encourages the gates to release themselves into a closed position;

i. it failed to construct and maintain gates that would open away from vehicles departing Clayton High School, on High School Drive, which would have prevented a gate from going through the windshield as it did in this case;

j. it constructed and maintained gates with a sharp end, rather than a blunt end, which allowed the gate in question to become a spear, piercing through the windshield at issue;

k. it constructed, implemented and maintained gates that were too high to prevent striking a windshield rather than at a height where the bumper area of a vehicle would be struck;

l. it failed to provide any type of adequate warning signs or stripes on the gate or the roadway, which would have advised a pedestrian or operator of a motor vehicle that the gate existed.

m. it failed to maintain and utilize a stop check on the top of the gate, which would have prevented the gate from moving more than 45 degrees to a closed position, and would have prevented the spearing of the vehicle that took place in this case;

n. it designed and implemented a dangerous gate system whereby the latch system of the gate extended across the only sidewalk on High School Drive, encouraging the latch not to be utilized or to be vandalized, so that pedestrians could pass;

o. after adequate notice of this accident and other collisions, which will be proven at trial, The Johnston County Board of Education has failed to correct this dangerous condition or to warn students, faculty and the public of the condition; and

p. in other respects as shall be shown at trial.

27. As a proximate result of the negligence of The Johnston County Board of Education, the Plaintiff, Nicole Ripellino received serious, painful and permanent bodily injuries and the Plaintiff

underwent severe pain and suffering, both of body and mind, some of which continue at the time of the filing of this action. Plaintiff has incurred hospital and medical expenses and has incurred transportation costs by reason of said injuries and the treatment thereof. The Plaintiff believes that her injuries may be permanent and that she may have decreased earning capacity, pain and suffering, both physical and mental, in the future, additional medical expenses, and loss of profits and wages by reason of the injuries sustained as hereinabove set forth.

28. The negligence of the Defendant, The Johnston County Board of Education, as set out above, was a proximate cause of the Plaintiff's injuries and damages.

29. In approximately October, 1998, The Johnston County Board of Education, the Association and Trust Defendants paid the property damage portion of the Ripellino claim in the amount of $2,153.18, thereby waiving any immunity for the injuries and damages as sustained by the Ripellino family as set forth in this Complaint. The defendants should be estopped from claiming immunity for the remaining portions of the Ripellino claim, by reason of their voluntary payment and admission of liability, by payment thereof.

30. Additionally, and in the alternative, The Johnston County Board of Education's participation with the Association and Defendant

Trusts as outlined above, amounts to a waiver of governmental immunity under N.C.G.S. § 115C-142.

31. Through the negligence of the agents and employees of the Defendant, The Johnston County Board of Education, the Plaintiff Nicole Ripellino is entitled to recover damages in excess of $10,000, as set by the Jury, for her personal injuries.

SECOND CLAIM FOR RELIEF - PARENTS' MEDICAL EXPENSE CLAIM

32. The allegations of all preceding paragraphs are incorporated by reference as though fully alleged herein.

33. At the time of the accident, Nicole Ripellino was 16 years of age, being a minor. The Plaintiffs, Louise A. Ripellino and Michael G. Ripellino, her parents, incurred and were responsible for her medical expenses relating to the accident in question, until such time as Nicole reached 18 years of age. As a proximate result of the negligence of the employees and agents of The Johnston County Board of Education, Louise A. Ripellino and Michael G. Ripellino, parents of Nicole, have incurred on her behalf in excess of $10,000 in medical expenses, causally related to the accident in question, and therefore seek to and are entitled to recover an amount, as set by the Jury, in excess of $10,000 for Nicole Ripellino's medical expenses while she was a minor.

THIRD CLAIM FOR RELIEF – DECLARATORY JUDGMENT

34. The allegations of all preceding paragraphs are incorporated by reference as though fully alleged herein.

35. Pursuant to Rule 57 of the North Carolina Rules of Civil Procedure, the Plaintiffs would request a declaratory judgment as to the coverage for Plaintiffs' damages provided by the defendants. Specifically, N.C.G.S. § 115C-142 provides for a board of education to waive governmental immunity by purchase of liability insurance. By statute and case law, a local board of education is not permitted to participate in a governmental risk-pool. Under § 115C-142, a local board of education can choose to purchase liability insurance as a waiver of immunity, or can claim governmental immunity. There is no allowance, in the statute, for a board of education to participate with the Association or Trust Defendants in the trusts described above. The trust documents at issue in this case shall be presented to the Court, after discovery, and it is respectfully requested that the Court should construe The Johnston County Board of Education's arrangement with the Association and the Trust Defendants as policies of liability insurance, as any other construction of the documents and arrangement would require a finding that The Johnston County Board of Education has acted illegally in participating in the Trusts. Additionally, the Plaintiffs ask the Court for its declaratory judgment that the defendants have waived immunity for the remaining portion of

Plaintiffs' claim, by reason of their payment of the property damage, and acceptance of liability.

FOURTH CLAIM FOR RELIEF – CHAPTER 75 CLAIM

36. The allegations of all preceding paragraphs are incorporated by reference as though fully alleged herein.

37. The actions of The Johnston County Board of Education, the Association, and the four Trust Defendants, in "waiving the flag" of immunity in many claims, and then voluntarily paying some of the claims through resources of these defendants, is an unfair and deceptive act or practice.

38. The reporting of claims, evaluation of claims, and use of telephone and fax lines to perpetuate the same, are all business activities in or affecting commerce as anticipated by N.C.G.S. § 75-1.1(b).

39. Additionally, should the Court construe the activities of the Defendants as actions involving policies of insurance, these same Defendants have violated various subsections of N.C.G.S. § 58-63-15(11), specifically but not limited to the following:

a. have misrepresented pertinent facts relating to coverages at issue;

b. have failed to acknowledge and to act reasonably promptly upon communications with respect to claims;

c. failed to adopt and implement reasonable standards for the prompt investigation of claims;

d. refusing to pay claims without conducting a reasonable investigation;

e. not attempting in good faith to effectuate prompt, fair and equitable settlements of claims;

f. compelled insureds, such as the present Plaintiffs, to institute litigation to recover amounts due them by offering to pay the property damage as an attempt to make the Plaintiffs drop the claim;

g. attempt to settle the claim for less than the amount that a reasonable man would think it is worth;

h. by making a claim payment to these Plaintiffs not accompanied by a statement setting forth the coverage under which the payment is being made;

i. by failing to promptly provide a reasonable explanation of the basis in the Trust documents in relation to the facts or applicable law for denial of the claim or for an offer of compromise settlement; and

j. in other manners as will be shown at trial.

40. The violation of any of the above subsections by the Association, The Johnston County Board of Education or Trust Defendants, amounts to an unfair or deceptive act or practice as a matter of law.

41. As a proximate result of the unfair or deceptive acts and practices of the Defendants, the Plaintiffs have been damaged in an amount in excess of $10,000, to be proven at trial, and are entitled to recover for the same. Furthermore, pursuant to N.C.G.S. § 75-16, the Plaintiffs are entitled to recover treble damages, and pursuant to § 75-16.1, are further entitled to recover their reasonable attorneys fees.

FIFTH CLAIM FOR RELIEF - CONSTITUTIONAL CLAIMS

42. The allegations of all preceding paragraphs are incorporated by reference as though fully alleged herein.

43. Plaintiffs bring their constitutional and federal claims pursuant to 42 U.S.C. §§ 1983, 1988, the Fifth, the Fourteenth Amendments to the United States Constitution and Article 1, Section 19, of the Constitution of the State of North Carolina. The damages complained of took place in Johnston County, North Carolina. As to the "Civil Rights Claims" (brought pursuant to 42 U.S.C. §§ 1983 and 1988), jurisdiction is contemporaneously

conferred upon both the United States District Court and this Court, and this Court has the authority under 42 U.S.C. § 1988 to award attorneys fees if the Plaintiffs prevail on their civil rights claims.

44. At all times pertinent hereto, The Johnston County Board of Education, the Association, and the Trust Defendants are each a "person" as contemplated by 42 U.S.C. § 1983. At all times pertinent hereto, the same defendants, in claiming immunity as to the Plaintiffs' claims for personal injury and medical expenses, were acting under color of N.C.G.S. § 115C-142, and other applicable North Carolina statutes, and have subjected these Plaintiffs to the deprivation of their equal protection and substantive due process rights under the United States Constitution, as enforced by 42 U.S.C. § 1983, and Article 1, Section 19 of the North Carolina Constitution.

45. These Plaintiffs have been denied due process and equal protection of the law as the Defendants have paid the property damage, but have asserted immunity in the remaining portion of Plaintiffs' claim, but have, upon information and belief, customarily waived it for similarly situated individuals who have been compensated for tort damages.

46. The Association, The Johnston County Board of Education and Trust Defendants' policy and custom of paying some claims but not paying others, when immunity could be raised in each one, has played a part in the violation of federal and

state law. Additionally, the Defendants' conduct in this case, of paying the property damage, and assuming liability for the claim, and then refusing to pay the personal injury and medical expense portion of the claim, is a violation of Plaintiffs' federal and state constitutional rights, as a matter of law.

47. Upon information and belief, the Association, Trust Defendants and The Johnston County Board of Education have what amounts to be unbridled discretion to resolve claims filed with the local board of education.

48. As a result of the conduct of these Defendants, the Plaintiffs have been deprived of their right to recover for the bodily injury and medical expenses portion of the Ripellino claim.

49. The Fourteenth Amendment to the United States Constitution, Article I, Section 19 of the North Carolina Constitution, and 42 U.S.C. § 1983 protect these Plaintiffs against intentional and arbitrary discrimination, being the conduct of the Association, Board of Education and Trust Defendants as to these Plaintiffs.

50. As a proximate result of the Fifth and Fourteenth Amendments to the United States Constitution, Article 1, Section 19 of the Constitution of the State of North Carolina, and 42 U.S.C. § 1983 violations by The Johnston County Board of Education, the Association, and the Trust Defendants, the Plaintiffs are entitled to recover damages, as set forth by the Jury, as well as

reasonable attorney fees, pursuant to 42 U.S.C. § 1988.

SIXTH CLAIM FOR RELIEF – PUNITIVE DAMAGES

51. The allegations of all preceding paragraphs are incorporated by reference as though fully alleged herein.

52. The conduct of The Johnston County Board of Education, in designing, constructing, maintaining, and implementing the gates in question, amounts to willful and wanton conduct on the part of the Board, in light of the fact that these gates have been hit by vehicles in the past, and yet The Johnston County Board of Education continues to maintain the gates in their deteriorated condition, where it was foreseeable that the gate would swing closed into the Plaintiff, Nicole Ripellino's vehicle. Additionally, even after having notice of the tragic accident involving Ms. Ripellino, some three years ago, the gates continue to be maintained in their present position, unsecured, and liable to close at any time, striking a motor vehicle. The Johnston County Board of Education, through its officers, directors, managers, agents and employees, engaged in this willful and wanton conduct, and such conduct was a proximate cause of all three Plaintiffs' injuries and damages. The conduct of this Defendant in failing to place warning signs on the gates or to correct this dangerous condition is further evidence of willful and wanton conduct. This conduct further shows a conscious or reckless disregard for the rights and safety of these

three Plaintiffs, as well as others similarly situated. The willful and wanton conduct of The Johnston County Board of Education, is an aggravating factor as anticipated by N.C.G.S. § 1D-15, and each Plaintiff is entitled to an award of punitive damages, as set by the Jury, in an amount in excess of $10,000.

WHEREFORE, the Plaintiffs, through counsel, would move the Court for the following relief:

1. That the Plaintiff, Nicole Ripellino, have and recover of the Defendant, The Johnston County Board of Education, an amount in excess of $10,000 as fair and reasonable satisfaction for her medical expenses, actual suffering, both in body and mind, in the past and prospective, a fair and reasonable compensation for inability to perform labor and the loss of capacity to earn money in the past and for prospective losses and as reasonable compensation for permanent injury, if such is found to exist.

2. That the Plaintiffs, Louise A. Ripellino and Michael G. Ripellino, have and recover of the Defendant, The Johnston County Board of Education, an amount in excess of $10,000 for the medical expenses they incurred on behalf of their daughter, Nicole Ripellino, during her period of minority, said bills being causally related to the accident at issue.

3. That this Court enter its declaratory judgment that the Trusts at issue are to be

construed as policies of liability insurance pursuant to § 115C-142, and that The Johnston County Board of Education has waived immunity for the Ripellino claim.

4. That this Court, having construed the Trusts at issue as policies of insurance, further declare and find the Association, Trust Defendants, and The Johnston County Board of Education have committed an unfair or deceptive trade practice or act prohibited by Chapter 75, and that the Plaintiffs recover treble damages, attorneys fees, and costs.

5. That the Plaintiffs recover damages for the conduct of the Association, Trust Defendants and The Johnston County Board of Education, which have violated the Fifth and Fourteenth Amendments of the United States Constitution, Article 1, Section 19 of the Constitution of the State of North Carolina, and the 42 U.S.C. § 1983 rights of these Plaintiffs, and that the Plaintiffs further recover their attorneys fees, pursuant to 42 U.S.C. § 1988.

6. That the Court find and enter its order that by payment of the property damage at issue, The Johnston County Board of Education, Association and the Trust Defendants, have waived governmental immunity as to the Plaintiffs' remaining claims.

7. That each plaintiff recovers punitive damages in an amount in excess of $10,000 for the willful and wanton conduct of The Johnston County School Board of Education.

8. For a trial by jury on all issues.

9. That the Plaintiffs recover pre-judgment interest from the date of filing of this action.

10. That pursuant to any applicable statute, that the costs of this action, including reasonable attorneys fees, be taxed against the Defendants.

11. For such other and further relief as this Court may deem just and proper.

This the /6th/ day of April, 2001.

MAST, SCHULZ, MAST, MILLS & STEM, P.A.

By: /s/Bradley N. Schultz
Bradley N. Schulz
State Bar No. 12789

By: /s/ Don R. Wells
Don R. Wells
State Bar No. 29503

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NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 01 CVS 609

[FILED June 11, 2001]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO and NICOLE RIPELLINO,

Plaintiffs,

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1977 NORTH CAROLINA

SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

ANSWER

The defendants, denominated in the Amended Complaint as "The North Carolina School Boards Association, Incorporated; the North Carolina School Boards Trust, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1982 North Carolina School Boards Association Self-Funded Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; and 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated;" answer the specific allegations of the Complaint as follows:

1. These defendants are without knowledge or information to form a belief as to the truth of the allegations contained in paragraph 1.

2. Admitted that the Johnston County Board of Education has such duties as provided by law, and that it operates Clayton High School in Clayton, North Carolina. These defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2.

3. Admitted that the North Carolina School Boards Association, Incorporated ("NCSBA") is a duly authorized, not-for-profit organization with its principal office located in Raleigh, Wake County, North Carolina, and that its members include all 117 local boards of education in North Carolina, including the Johnston County Board of Education. Except as admitted, paragraph 3 is denied.

4. Admitted that in 1982, NCSBA established what is presently known as the North Carolina School Boards Trust ("NCSBT"), which, at that time, provided worker's compensation coverage through a member-funded trust fund and excess insurance in accordance with the terms of the applicable participation agreement and excess insurance contract. Further admitted that NCSBT is administered by NCSBA. Except as admitted, paragraph 4 is denied.

5. Admitted that in 1982, NCSBA established what is presently known as the North Carolina School Boards Trust Worker's Compensation Fund, which was its first trust fund and which provides worker's compensation coverage for locally and federally funded school employees through a member-funded trust fund and excess

insurance in accordance with the terms of the applicable participation agreement and excess insurance contract. Further admitted that such Fund is administered by NCSBA. Except as admitted, paragraph 5 is denied.

6. Admitted that in 1986, NCSBA created what is presently known as the North Carolina School Boards Trust Errors & Omissions/General Liability Fund, which was its second trust fund, to provide errors and omissions and general liability coverage for school districts, local boards of education, school board members, school employees and authorized school volunteers in accordance with the terms of the applicable coverage agreement and excess insurance contract. Further admitted that such Fund is administered by NCSBA. Except as admitted, paragraph 6 is denied.

7. Admitted that in 1997, NCSBA created the North Carolina School Boards Trust Automobile/Inland Marine Fund, which was its third trust fund, to provide automobile and inland marine coverage for school-owned vehicles and miscellaneous specified property, including coverage for yellow school buses for exposure not covered by the State Tort Claims Act in accordance with the terms of the applicable coverage agreement and excess insurance contract. Further admitted that such Fund is administered by NCSBA. Except as admitted, paragraph 7 is denied.

8. Denied.

9. Denied.

10. Denied.

11. Admitted that NCSBA and the referenced trust funds are not govemmental-risk pools. Further admitted that Section 115C-142 is in writing and speaks for itself. Except as admitted, paragraph 11 is denied.

12. Admitted that NCSBA has established a website on which, in the past, authorized personnel from member districts could log on for purposes of obtaining payment information in worker's compensation claims. These defendants are without knowledge or sufficient information to form a belief as to when the Ripellino claim was first reported to the Johnston County Board of Education or when medical bills and records were forwarded to Dr. Causby. Except as admitted, paragraph 12 is denied.

13. Admitted that NCSBT adjusts claims throughout North Carolina pursuant to its participation agreement and/or its coverage agreements with its members. Except as admitted, paragraph 13 is denied.

14. Admitted, on information and belief, that Superintendent Causby is an agent of Johnston County Board of Education. Except as admitted, paragraph 14 is denied.

15. Admitted that the immunity defense is raised in appropriate cases. Further admitted that NCSBT has paid claims in the past, notwithstanding the assertion of immunity, in specific types of situations, such as situations in which the

settlement amount is less than the potential cost of defense or in situations which include a claim against an individual who does not have immunity, or a claim for which the immunity defense is not available. Except as admitted, paragraph 15 is denied.

16. Admitted that the Johnston County Board of Education operates and maintains Clayton High School, an educational facility in Johnston County. These defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 16.

17. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18.

19. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19.

20. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20.

FIRST CLAIM FOR RELIEF
Negligence

21. These defendants incorporate by reference their responses to paragraphs 1-20.

22. Admitted, on information and belief, that on March 9, 1998, there was a collision between the plaintiffs' vehicle and a gate on the property of Clayton High School. These defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 22.

23. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 23.

24. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 24.

25. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25.

26. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26.

27. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27.

28. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28.

29. Admitted, on information and belief, that a property damage claim was paid by the

Johnston County Board of Education. Except as admitted, paragraph 29 is denied.

30. Denied.

31. Denied.

SECOND CLAIM FOR RELIEF
Parents' Medical Expense Claim

32. These defendants incorporate by reference their responses to paragraphs 1-31.

33. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33.

THIRD CLAIM FOR RELIEF
Declaratory Judgment

34. These defendants incorporate by reference their responses to paragraphs 1-33.

35. Admitted that the plaintiffs have requested the relief set forth in paragraph 35 but denied that the plaintiffs are entitled to such relief. Further admitted that a local board of education has no authority to participate in a local government-risk pool pursuant to North Carolina law. Further admitted that N.C.G.S.§115C-142 does not address whether a board of education can participate with NCSBA or the trusts administered by NCSBA, inasmuch as N.C.G.S. §115C-142 does not pertain to immunity at all or other relevant subject matter. Except as admitted, paragraph 35 is denied.

FOURTH CLAIM FOR RELIEF
Chapter 75 Claim

36. These defendants incorporate by reference their responses to paragraphs 1-35.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

FIFTH CLAIM FOR RELIEF
Constitutional Claims

42. These defendants incorporate by reference their responses to paragraphs 1-41.

43. Admitted, on information and belief, that the incident in question took place in Johnston County, North Carolina. The remaining allegations of paragraph 43 state legal conclusions to which no response is required. Admitted that the referenced statutes are in writing and speak for themselves. Except as admitted, paragraph 43 is denied.

44. The allegations of paragraph 44 state legal conclusions to which no response is required. Admitted that the referenced statutes are in writing and speak for themselves. Except as admitted, paragraph 44 is denied.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. The allegations of paragraph 49 state legal conclusions to which no response is required. Admitted that the referenced constitutional section and statute are in writing and speak for themselves. Except as admitted, paragraph 49 is denied.

50. Denied.

SIXTH CLAIM FOR RELIEF
Punitive Damages

51. These defendants incorporate by reference their responses to paragraphs 1-50.

52. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 52.

ALL ALLEGATIONS NOT SPECIFICALLY ADMITTED ARE DENIED.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief may be granted as to the answering defendants.

SECOND AFFIRMATIVE DEFENSE

Other than NCSBA, the other answering defendants are not legal entities and cannot be sued.

THIRD AFFIRMATIVE DEFENSE

The applicable NCSBT Errors and Omissions/General Liability Coverage Agreement specifically provides that "no Member shall admit any liability, settle any Claim, incur any costs or retain any attorney, the cost of which the Member expects the Fund to pay, without the written consent of the Fund." Any admission of liability on the part of the Johnston County Board of Education without the consent of NCSBT would violate the terms of the Coverage Agreement and void coverage for this claim.

FOURTH AFFIRMATIVE DEFENSE

The applicable NCSBT Errors and Omissions/General Liability Coverage Agreement specifically provides as follows:

Litigation Against the Fund

No legal action may be brought against the Fund until there has been full compliance with all terms of this Coverage Agreement. In addition, no legal action may be brought against the Fund until:

a. The Fund agrees in writing (i) that the Member has an obligation to pay the

Claim, and (ii) on the amount of such obligation; or

b. The amount of the Member's obligation has been finally determined by judgment after trial.

No person or organization has the right under this Coverage Agreement to bring the Fund into any action to determine the liability of a Member.

The answering defendants are improper defendants in this action.

FIFTH AFFIRMATIVE DEFENSE

The plaintiffs have no standing to file suit against these defendants pursuant to law and/or the terms of the applicable NCSBT Errors and Omissions/General Liability Coverage Agreement or any other coverage or participation agreement.

SIXTH AFFIRMATIVE DEFENSE

These defendants plead lack of personal jurisdiction, insufficiency of process and insufficiency of service of process in bar to this action.

SEVENTH AFFIRMATIVE DEFENSE

These defendants plead all applicable statutes of limitation and repose in bar to this action, in whole or in part.

EIGHTH AFFIRMATIVE DEFENSE

The North Carolina School Boards Trust Worker's Compensation Fund and the North Carolina School Boards Trust Automobile/Inland Marine Fund have no application to the matters in issue in this lawsuit.

NINTH AFFIRMATIVE DEFENSE

In the alternative to dismissal, these defendants are entitled to severance of all claims against them, in that such claims are inappropriately joined with the claims against the Johnston County Board of Education.

WHEREFORE, these defendants pray:

1. That this action be dismissed;

2. That the plaintiffs have and recover nothing of these defendants;

3. That the costs of this action, including attorney's fees, be taxed against the plaintiffs;

4. For a trial by jury on all issues so triable; and

5. For such other relief as the court deems appropriate.

This the 8th day of June, 2001.

YATES, McLAMB & WEYHER, L.L.P.

By:/s/Michael C. Hurley/for NCBN 19648
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STATE OF NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 01 CVS 609

[FILED June 12, 2001]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA

SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

ANSWER OF THE JOHNSTON COUNTY BOARD OF EDUCATION TO PLAINTIFF'S FIRST AMENDED COMPLAINT

NOW COMES the Johnston County Board of Education (hereinafter "Board") by and through counsel, and responds to Plaintiffs' First Amended Complaint as follows:

FIRST DEFENSE

The plaintiffs' First Amended Complaint, or one or more causes of action contained therein, fails to state a claim upon which relief can be granted against the Board.

SECOND DEFENSE

The Board responds to the specifically enumerated paragraphs of Plaintiffs' First Amended Complaint as follows:

1. Admitted, upon information and belief.

2. The Board alleges that the allegations of the first sentence of Paragraph 2 are conclusions of law to which no response is required. To the extent that a response to those allegations is deemed to be required, they are admitted, except that it is denied that the Board is charged with the duty of providing a safe environment for the education of children and their travel to and from the school facility. The Board admits the allegations of the second sentence of Paragraph 2.

3. The Board admits that it is a member of the North Carolina School Board's Association, Incorporated (hereinafter "Association"). The Board lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 3 and they are therefore denied.

4. The Board lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 4 and they are therefore denied.

5. The Board lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 5 and they are therefore denied.

6. The Board lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 6 and they are therefore denied.

7. The Board lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 7 and they are therefore denied.

8. The Board alleges that the allegations of Paragraph 8 are directed to parties other than the Board, such that the Board has no obligation to respond to those allegations. To the extent that a response by the Board is deemed to be required, those allegations are denied.

9. The Board denies the allegations of Paragraph 9.

10. The Board denies the allegations of Paragraph 10.

11. The Board alleges that the allegations of Paragraph 11 are directed to parties other than the Board, such that the Board has no obligation to respond to those allegations. To the extent that a response by the Board is deemed to be required, it is admitted that the Association and trust defendants are not risk pools. The allegations are otherwise denied.

12. The Board denies the allegations of Paragraph 12.

13. The Board alleges that the allegations of Paragraph 13 are directed to parties other than the Board, such that the Board has no obligation to respond to those allegations. To the extent that a response by the Board is deemed to be required, those allegations are denied.

14. The Board admits that Superintendent Causby is, at certain times and with regard to certain

matters, an agent of the Board. The remaining allegations of Paragraph 14 are denied.

15. The Board admits that, in specific circumstances, such as where defense costs wuld exceed the costs of settlement and where a non-immune defendant was entitled to coverage, claims were paid. The Board further admits it has raised immunity defense appropriately in other cases. The Board denies the remaining allegations of Paragraph 15.

16. The Board admits the allegations of Paragraph 16, except that the Board denies that it had any duty to inspect the gates described.

17. The Board admits the allegations of Paragraph 17.

18. The Board denies the allegations of Paragraph 18.

19. The Board denies the allegations of Paragraph 19.

20. The Board alleges that the allegations of Paragraph 20 are conclusions of law to which no response is required. In the event that a response is deemed to be required, the Board admits that Nicole Ripellino was a student enrolled at Clayton High School at the time of the accident described in the Plaintiffs' First Amended Complaint.

RESPONSE TO FIRST CLAIM FOR RELIEF – NEGLIGENCE

21. The Board realleges and incorporates by reference its responses to Paragraphs 1 through 20 as though fully set forth herein.

22. The Board admits, upon information and belief, that at approximately the time alleged, Nicole Ripellino's car struck one of the gates on High School Drive. The Board further admits that it owned the gate. The remaining allegations of Paragraph 22 are denied.

23. The Board denies the allegations of Pargaraph 23.

24. The Board denies the allegations of Paragraph 24.

25. The Board denies the allegations of Paragraph 25.

26. The Board denies the allegations of Paragraph 26, and each subparagraph thereof.

27. The Board denies the allegations of Paragraph 27.

28. The Board denies the allegations of Paragraph 28.

29. The Board denies the allegations of Paragraph 29 except that it admits it made some

payment to plaintiffs for physical damage to the Ripellino vehicle.

30. The Board denies the allegations of Paragraph 30.

31. The Board denies the allegations of Paragraph 31.

RESPONSE TO SECOND CLAIM FOR RELIEF - PARENTS' MEDICAL EXPENSE CLAIM

32. The Board realleges and incorporates by reference its responses to Paragraphs 1 through 31 as though fully set forth herein.

33. The Board admits, upon information and belief, the allegations of the first sentence of Paragraph 33. The Board alleges that the allegations of the second sentence of Paragraph 33 are conclusions of law to which no response is required. The Board denies the remaining allegations of Paragraph 33.

RESPONSE TO THIRD CLAIM FOR RELIEF - DECLARATORY JUDGMENT

34. The Board realleges and incorporates by reference its responses to Paragraphs 1 through 33 as though fully set forth herein.

35. The Boards admits that the Plaintiffs request a declaratory judgment as set forth in Paragraph 35. The Board denies that the plaintiffs

are entitled to the declaratory judgment sought, and deny the remaining allegations of Paragraph 35.

RESPONSE TO FOURTH CLAIM FOR RELIEF - CHAPTER 75 CLAIM

36. The Board realleges and incorporates by reference its responses to Paragraphs 1 through 35 as though fully set forth herein.

37. The Board denies the allegations of Paragraph 37.

38. The Board alleges that the allegations of Paragraph 38 are conclusions of law to which no response is required. To the extent that a response to those allegations is deemed to be required, they are denied.

39. The Board denies the allegations of Paragraph 39, and each subparagraph thereof.

40. The Board denies the allegations of Paragraph 40.

41. The Board denies the allegations of Paragraph 41.

RESPONSE TO FIFTH CLAIM FOR RELIEF - CONSTITUTIONAL CLAIMS

42. The Board realleges and incorporates by reference its responses to Paragraphs 1 through 41 as though fully set forth herein.

43. The Board alleges that the allegations of Paragraph 43 are conclusions of law to which no response is required. To the extent that a response to those allegations is deemed to be required, the allegations are denied.

44. The Board alleges that the allegations of Paragraph 44 are conclusions of law to which no response is required. To the extent that a response to those allegations is deemed to be required, the allegations are denied.

45. The Board denies the allegations of Paragraph 45.

46. The Board denies the allegations of Paragraph 46.

47. The Board denies the allegations of Paragraph 47.

48. The Board denies the allegations of Paragraph 48.

49. The Board denies the allegations of Paragraph 49.

50. The Board denies the allegations of Paragraph 50.

RESPONSE TO SIXTH CLAIM FOR RELIEF - PUNITIVE DAMAGES

51. The Board realleges and incorporates by reference its responses to Paragraphs 1 through 50 as though fully set forth herein.

52. The Board denies the allegations of Paragraph 52.

THIRD DEFENSE

As to each and every one of the Plaintiffs' claims against it, the Board asserts the doctrine of sovereign and/or governmental immunity to the fullest extent allowed by law.

FOURTH DEFENSE AND MOTION TO BIFURCATE CLAIM FOR PUNITIVE DAMAGES

If an issue relating to punitive damages is to be submitted to the jury, The Board moves, pursuant to N.C. Gen. Stat. § 1D-30, that the issues of liability for compensatory damages and the amount of compensatory damages, if any, be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any.

FIFTH DEFENSE

Plaintiffs' claim for punitive damages is unconstitutional because it is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that it deprives The Board of property without due process of law; it is violative of

the Fourteenth Amendment of the Constitution of the United States because it denies equal protection to The Board; it is violative of the North Carolina Constitution in that it denies equal protection to The Board and deprives The Board of property without due process of law; and finally, it is violative of the prohibition against excess fines in the Eighth Amendment of the Constitution of the United States and in the North Carolina Constitution.

SIXTH DEFENSE AND MOTION FOR ATTORNEYS' FEES

The Board alleges that the Plaintiffs' claim for punitive damages is one which the Plaintiffs know or should know to be frivolous or malicious. The Board hereby gives notice that, pursuant to N.C. Gen. Stat. § 1D-45, it will seek an award of reasonable attorneys fees resulting from the defense against the punitive damage claim asserted by the Plaintiffs, and to the extent any damages may be awarded the Plaintiffs as compensatory damages, that The Board will seek to have such award be set off against the attorneys fees sought herein.

SEVENTH DEFENSE

The plaintiffs' claim for punitive damages must be dismissed on the grounds that punitive damages are not recoverable against the Johnston County Board of Education.

EIGHTH DEFENSE

If the Board was negligent, or its conduct was willful, wanton, reckless or intentional, which is denied, then upon information and belief, at the time of the events alleged in the Plaintiffs' First Amended Complaint, the actions of the Plaintiff Nicole Ripellino were negligent, willful, wanton, reckless, or intentional in that:

(a) Nicole Ripellino placed herself in a place at a time and under circumstances that she knew, or should have known, were likely to create an unreasonable risk of harm to her;

(b) She failed to keep a reasonable lookout as required for her own safety and protection;

(c) She drove at a speed and in a manner that were unsafe for the area in which she was driving;

(d) She was negligent in such other and further ways as may be shown through discovery and at trial.

Upon information and belief, the plaintiffs' own negligent, willful, wanton, reckless and/or intentional conduct was a proximate cause of the Plaintiffs' injuries and is a complete bar to the Plaintiffs' claims against The Board.

NINTH DEFENSE

It is specifically denied that any conditions of The Board's premises were dangerous or defective. If dangerous or defective conditions existed, however, the Plaintiffs had equal or greater knowledge of those conditions and The Board therefore had no duty to warn plaintiffs of those conditions.

TENTH DEFENSE

It is specifically denied that any conditions of the Board's premises were dangerous or defective. If dangerous or defective conditions existed, however, they were open and obvious, not latent or concealed.

ELEVENTH DEFENSE AND MOTION TO BIFURCATE

The Board moves pursuant to Rules 42(b) and 26(c) of the North Carolina Rules of Civil Procedure for an order bifurcating the Plaintiffs' Third Claim for Relief - Declaratory Judgment and Fifth Claim for Relief - Constitutional Claims from the remaining claims for relief for purposes of discovery and trial, so that any discovery necessary for the resolution of the Third and Fifth Claims for Relief be accomplished prior to any other discovery and the Court enter its judgment relating to the Third and Fourth Claims for relief prior to any discovery concerning or ruling on any other claim for relief.

WHEREFORE, having fully responded to the Plaintiffs' First Amended Complaint, the Board prays the Court as follows:

1. That the declaratory judgment sought by the Plaintiffs be denied;

2. That the Complaint against it be dismissed;

3. That the Plaintiffs have and recover nothing from the Board;

4. For a trial by jury on all issues so triable;

5. That the costs of this action, including reasonable attorneys' fees, be taxed against the Plaintiffs;

6. That the Plaintiffs' Third and Fifth Claims for Relief, be bifurcated from the remainder of the suit for purposes of discovery and trial;

7. That any compensatory damages awarded against the Board be subject to a setoff for the attorneys' fees and expenses incurred by the Board in connection with the Plaintiffs' claim for punitive damages;

8. That the issue of the Board's liability for compensatory damages, if any, and the amount of compensatory damages, be tried separately from the issue of the Board's liability for punitive damages, if any, and the amount thereof;

9. For such other and further relief as the Court deems just and proper.

This the /11th/ day of June, 2001.

CRANFILL, SUMNER & HARTZOG, L.L.P.

BY: /s/UNKNOWN for SHA
STEPHANIE HUTCHINS AUTRY
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STATE OF NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CVS 609

[FILED November 12, 2001]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA

SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

SUPPLEMENTAL RESPONSES OF THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION DEFENDANTS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

The defendants, denominated in the Amended Complaint as "The North Carolina School Boards Association, Incorporated; the North Carolina School Boards Trust, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1982 North Carolina School Boards Association Self-Funded Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; and 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated," (hereinafter collectively referred to as the "NCSBA

Defendants"), pursuant to the Consent Order entered in this case on October 22, 2001, hereby provide the following additional information to the plaintiffs:

INTERROGATORIES

1. File Custodian and Persons Providing Factual Information.

There is no file custodian, per se, but the litigation files fall within the Litigation Counsel's responsibility. The Litigation Counsel is Donna Lynch, North Carolina School Boards Association, 7208 Falls of Neuse Road, Raleigh, NC 27615, Phone: 919-841-4040. The persons who provided factual information contained in the NCSBA Defendants' discovery responses are as follows: Patti Vermillion, Director of Finance (information on the NCSBA website); Dr. Edwin Dunlap, Executive Director (information on the Trust documents); Donna Lynch, Litigation Counsel (all other information). Their address is 7208 Falls of Neuse Road, Raleigh, NC 27615, Phone: 919-841 -4040.

2. Claim Settlement Practices. This document is attached.

3. Personal Injury and Property Damages Claims made to Johnston County Board of Education.

See Supplemental Response of Defendant Johnston County Board of Education, dated

September 10, 2001, which is incorporated herein by reference.

This /12/ day of November, 2001.

YATES, McLAMB & WEYHER, L.L.P.

By:/s/Barbara B. Weyher

Barbara B. Weyher
N.C. State Bar No. 9029
Attorneys for the N.C. State School Boards Association Defendants
P. O. Box 2889
Raleigh, NC 28702
Phone: 919-835-0900

[CONFIDENTIAL]

CLAIM SETTLEMENT PRACTICES

The following types of claims may be settled by NCSBT, subject to evaluation of the liability (including cost of defense) and damages issues, notwithstanding the availability of a sovereign immunity defense as to any portion of the claim.

1. Any claim which includes a component part for which the immunity defense may not be available.

2. Any claim in which there is a reasonable possibility that defense costs will exceed the amount for which the case can be settled.

3. Any claim in which the settlement amount exceeds the applicable Fund Limit and involves payment by the excess insurer.

4. Any claim which is related to one or more other claims for which the defense of sovereign immunity may not be available.

NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBER 01 CVS 609

[FILED April 12, 2002]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, and NICOLE RIPELLINO,

Plaintiff,

VS.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATIONS, INCORPORATED, NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created administered by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/ GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by THE NORTH CAROLINA SCHOOLS BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO-INLAND MARINE TRUST FUND, a division and/or department of, created and administered by by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION

INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

NOTICE OF APPEAL
(OTHR)

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COMES the Plaintiffs, through counsel, and hereby give NOTICE OF APPEAL to the North Carolina Court of Appeals from the Summary Judgment entered by this court on March 15th, 2002, as well as the Order entered by this court on April 11, 2002.

Respectfully submitted this /12th/ day of April, 2002.

MAST, SCHULZ, MAST, MILLS & STEM & JOHNSON, P.A.

BY: /s/Bradley N. Schulz
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Attorneys for Plaintiffs
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State Bar # 12789

STATE OF NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CVS 609

[FILED June 24, 2004]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA

SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

MOTION FOR JUDGMENT ON THE PLEADINGS
(JOPL)

NOW COMES the Defendant, Johnston County Board of Education ("Board"), by and through its undersigned counsel, and respectfully moves the Court pursuant to Rule 12(c) for an Order granting judgment on the pleadings in its favor on the constitutional claims in this action. This matter comes before the Court upon remand from the North Carolina Court of Appeals, No. COA 02-1309, where the appellate court in its June 17, 2003 decision affirmed in part, reversed in part and remanded the judgment entered on March 15, 2002 by the Honorable Knox V. Jenkins, Jr. granting all defendants summary judgment as to all claims. In support of the Board's present Motion, the Board respectfully shows the Court that it is entitled to judgment as a matter of law on all constitutional claims based on the following grounds, among others:

1. It is well-settled that the Board is not an entity that can be sued under 42 U.S.C. § 1983 where monetary

damages are sought. *See Messick* v. *Catawba County,* 110 N.C.App. 707, 431 S.E.2d 489, *disc. rev. denied,* 334 N.C. 621, 435 S.E.2d 336 (1993);

2. Plaintiffs have failed to state a claim under the North Carolina Constitution.

WHEREFORE, the Board moves the Court for an order granting judgment on the pleadings in its favor as to the constitutional claims as set forth above.

This the /23rd/ day of June, 2004.

CRANFILL, SUMNER & HARTZOG, L.L.P.

BY: /s/Rachel Esposito
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STATE OF NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CVS 609

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs,

vs.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division

and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants.

MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants, denominated in the Complaint as "The North Carolina School Boards Association, Incorporated; the North Carolina School Boards Trust, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1982 North Carolina School Boards Association Self-Funded Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; and 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated" (collectively "Trust Defendants"), through the undersigned counsel, respectfully move the Court, pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, for an Order granting judgment on the pleadings in their favor on the constitutional claims (Fifth Claim for Relief) in this action. In

support of this motion the Trust Defendants represent to the Court the following:

1. This matter is before the Court on remand from the North Carolina Court of Appeals, No. COA 02-1309, where the appellate court in its June 17, 2003 decision affirmed in part, reversed in part and remanded the Judgment entered on March 15, 2002 by the Honorable Knox V. Jenkins, Jr. granting all defendants summary judgment as to all claims. 158 N.C. App. 423, 581 S.E.2d 177 (2003), *rev. denied,* 358 N.C. 156, 592 S.E.2d 694 (2004).

2. The Trust Defendants incorporate by reference the positions set forth in the separate Motion for Judgment on the Pleadings filed by the defendant Johnston County Board of Education.

3. The decision of the North Carolina Court of Appeals in this case held: "Plaintiffs' claims against the trust defendants are related to and contingent upon the claims against the Board. To extent the trial court properly granted summary judgment in favor of the Board, the claims against the trust defendants are also properly granted." 158 N.C. App. at 431. Accordingly, to the extent that the Court grants the Motion for Judgment on the Pleadings of the defendant Johnston County Board of Education, judgment on the pleadings with respect to the constitutional claims should also be entered for the Trust Defendants.

Wherefore, the Trust Defendants move the Court for an Order granting judgment on the

pleadings in their favor as to the constitutional claims referenced above.

This /23rd/ day of /June/, 2004

YATES, McLAMB & WEYHER, L.L.P.

By:/s/Barbara B. Weyher

Barbara B.Weyher
N.C. State Bar No. 9029
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NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBER 02 CVS 609

[FILED October 1, 2004]

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, and NICOLE RIPELLINO,

Plaintiff,

VS.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATIONS, INCORPORATED, NORTH CAROLINA SCHOOL BOARDS TRUST, a division and/or department of, created administered by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED
1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/ GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by THE NORTH CAROLINA SCHOOLS BOARDS ASSOCIATION, INCORPORATED; **1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO-INLAND MARINE TRUST FUND**, a division and/or department of, created and administered by by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION

INCORPORATED, and **THE JOHNSTON COUNTY BOARD OF EDUCATION**,

Defendants.

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COME the Plaintiffs, through counsel, and hereby give NOTICE OF APPEAL to the North Carolina Court of Appeals from Orders entered by the Hon. Knox V. Jenkins, Jr. on September 3, 2004 and September 9, 2004 granting summary judgment and judgment on the pleadings for the Trust Defendants and the Johnston County Board of Education.

This the 1st day of October, 2004.

MAST, SCHULZ, MAST, MILLS, JOHNSON & WELLS, P.A.

BY:/s/Bradley N. Schulz
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NO. 180A06 ELEVEN-B DISTRICT

SUPREME COURT OP NORTH CAROLINA

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO

v

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, ET AL

NOTICE OF APPEAL
(Dissent)
(Johnston County Board of Education)
(Filed 6 April 2006)
and
NOTICE OF APPEAL
(Constitutional Question)
(Johnston County Board of Education)
(Filed 6 April 2006)
(Dismissed Ex Mero Motu 29 June 2006)
and
PETITION FOR DISCRETIONARY REVIEW
AS TO ADDITIONAL ISSUES
(Johnston County Board of Education)
(Filed 6 April 2006)
(Allowed 29 June 2006)

[FILED April 6, 2006]

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NO. 06P____

SUPREME COURT OF NORTH CAROLINA

From Johnston County
No. 01 CVS 609
COA No. COA04-1681

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO,
Plaintiff-Appellees;

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUN, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLIAN SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED

AUTO/INLAND MARINE TRUST FUND, A DIVISION AND/OR DEPARTMENT OP, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; AND THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendant-Appellants.

DEFENDANT-APPELLANT JOHNSTON COUNTY BOARD OF EDUCATION'S NOTICE OF APPEAL AND PETITION FOR DISCRETIONATY REVIEW

NOTICE OF APPEAL

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES DEFENDANT-APPELLANT Johnston County Board of Education (hereinafter "the Board") and hereby appeals of right to the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-30(1) and (2) and Rule 14(b)(1) and (2) of the North Carolina Rules of Appellate Procedure, from the Opinion of the Court of Appeals in COAG4-1681, filed March 7, 2 006, attached hereto as Exhibit A. This Opinion reversed the trial court's entry of summary judgment in favor of the Board on plaintiffs' non-constitutional claims[1] and

---

[1] These claims include only plaintiffs' negligence claim and claim for parental medical expenses, which is simply derivative of the negligence claim. Although in their amended complaint (R. pp. 4-21) plaintiffs purported to state other non-constitutional claims for declaratory judgment, unfair and deceptive trade practices and punitive damages, plaintiffs did not appeal the original entry of summary judgment in favor of the Board on their claims for declaratory judgment and unfair and deceptive trade practices in the first appeal of this matter. *See Ripellino* v. *North Carolina School Boards Ass'n, Inc.*, 158 N.C. App. 423, 581 S.E.2d 88 (2003), *cert, denied,* 358 K.C. 156, 592 S.E.2d 694 (2004) . Additionally, the Court of Appeals in that case affirmed summary judgment in favor of the Board on plaintiffs' claim to punitive damages, which affirmation this Court declined to review.

reversed the trial court's entry of judgment on the pleadings in favor of the Board on plaintiffs' federal and state constitutional claims.

(1) Pursuant to N.C. Gen. Stat. § 7A-30(2), the Board appeals of right to this Court based upon the dissenting opinion of Judge Eric Levinson, in which he concluded that the trial c[illegible] properly entered judgment on the pleadings in favor of the Board on plaintiffs' federal and state constitutional claims, as plaintiffs' complaint failed to set forth facts which, taken as true, would state any claim for relief under either constitution. Pursuant to this dissent, the Board appeals of right the following issue:

> Whether the Court of Appeals erred in reversing the trial court's grant of judgment on the pleadings in favor of the Board with respect to plaintiffs' claims under the federal and state constitutions where plaintiffs' allegations fail to state a claim for relief under either constitution?

(2) Additionally, pursuant to N.C. Gen. Stat. § 7A-30I1), the Board appeals of right to this Court those portions of the Court of Appeals' Opinion not addressed in Judge Levinson's dissent which directly involve substantial questions arising under the

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Accordingly, the only remaining non-constitutional claims at issue on the Board's current Notice of Appeal and Petition for Discretionary Review are the claims for negligence and derivative parental medical expenses.

federal and state constitutions. Specifically, those issues include (a) the majority's conclusion that a local board of education is a "person" within the meaning of 42 U.S.C. § 1983 such that it may be held liable for alleged violations of plaintiffs' federal equal protection rights and due process rights (U.S. Const, amend. XIV; U.S. Const, amend. XIV, § 1) ; and (b) the majority's conclusion that plaintiffs could proceed with their state constitutional claims in the absence of an adequate state remedy (N.C. Const, art. I, § 19).

The foregoing issues are clearly those involving substantial questions arising under the federal and state constitutions. Accordingly, pursuant to N.C. Gen. Stat. § 7A-30(1), the Board therefore additionally appeals the following issues of right[2]:

> Whether the Court of Appeals erred in concluding that the Board is not an agency of the State and is therefore a "person" within the meaning of 42 U.S.C. § 1983 such that it can be

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[2] In the event this Court disagrees that these issues constitute substantial questions arising under the federal and state constitutions such that the Board may appeal of right pursuant to N.C. Gen. Stat. § 7A-30(1), the Board has additionally incorporated these issues in its contemporaneously filed Petition for Discretionary Review, and in the alternative, seeks review of these issues on the grounds contained in that Petition.

subject to claims under the federal constitution?

Whether the Court of Appeals erred in concluding that plaintiffs lacked an adequate state remedy such that plaintiffs can proceed against the Board with a direct claim under the state constitution?

Pursuant to Appellate Rule 14(b)(2), the Board submits these constitutional issues were timely raised before the trial court in the Board's Motion for Judgment on the Pleadings (R. p. 148) , and were also properly raised in the Board's Brief to the Court of Appeals contained in the Record before this Court, and as asserted, were erroneously decided by the Court of Appeals. The Board submits its rights have been violated inasmuch as the law clearly establishes that it is an arm of the State immune from federal constitutional claims under 42 U.S.C. § 1983, and that it cannot be subject to liability under the state constitution where plaintiffs possess an adequate state remedy as that term has been defined by the appellate courts of this State.

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES DEFENDANT-APPELLANT Johnston County Board of Education (hereinafter "the Board"), by and through the undersigned counsel of record, and respectfully petitions the

Supreme Court of North Carolina, pursuant to N.C. Gen. Stat. § 7A-31, to certify for discretionary review the Opinion of the North Carolina Court of Appeals reversing the trial court's grant of summary judgment and judgment on the pleadings in favor of the Board on grounds that the Opinion is contrary to the lav; as established by the North Carolina Supreme Court; contravenes legal principles of major significance to the jurisprudence of this State; and involves issues of significant public interest and policy. The Court of Appeals' Opinion which is the subject of this Petition is attached hereto as Exhibit A and is incorporated herein by reference.

STATEMENT OF THE CASE

On April 6, 2001, plaintiffs filed an amended complaint against several defendants arising out of injuries allegedly-sustained by plaintiff Nicole Ripellino when she was operating her vehicle on the Board's property at Clayton High School and a traffic control gate came in contact with her vehicle. (R. pp. 4-21). Plaintiffs purported to state various non-constitutional claims, including negligence, parental medical expenses, declaratory judgment, unfair and deceptive trade practices, and punitive damages, as well as constitutional claims arising under the Fifth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. §§ 1983 and 1988, and Article I, Section 19 of the North Carolina Constitution. (R. pp. 4-21) . The Board answered plaintiffs' complaint on June 11, 2001, denying any wrongdoing, and asserting various affirmative defenses, including sovereign/governmental immunity. (R. pp. 45-56).

As set forth in the Court of Appeals' first decision in this matter, *Ripellino v. North Carolina School Boards Ass'n, Inc.*, 158 N.C. App. 423, 581 S.E.2d 88 (2003), *cert, denied,* 358 N.C. 156, 592 S.E.2d 694 (2004) (hereinafter "*Ripellino* I"), the Board thereafter moved for summary judgment, and on March 15, 2002, the trial court entered judgment as a matter of law in favor of the Board as to all claims. *Id.* at 425, 581 S.E.2d at 91.

In *Ripellino I,* the Court of Appeals concluded that, with respect to plaintiffs' non-constitutional claims,[3] the trial court correctly concluded the Board was immune from suit under the doctrine of sovereign immunity for any claims not exceeding $100,000, as the Board's participation in the North Carolina School Boards Trust ("NCSBT") for claims up to $100,000 did not constitute a waiver of that immunity. Id. at 428-29, 581 S.E.2d at 92-93. However, the *Ripellino I* court reversed summary judgment to the extent the remaining claims might be covered under the Board's excess insurance policy for claims between $100,000 and $1,000,000. Id. Accordingly, the Court of Appeals remanded the

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[3] Again, plaintiffs did not appeal the entry of summary judgment with respect to their claims for declaratory judgment or unfair and deceptive trade practices (see R. p. 87), and those claims are therefore no longer at issue in this case. As the Court of Appeals affirmed the entry of summary judgment for the Board on the issue of punitive damages, the only remaining non-constitutional claims at issue in this case are plaintiffs' claims for negligence and parental medical expenses.

matter to the trial court to proceed with the non-constitutional claims to the extent those claims might be covered under the Board's excess liability policy.

With respect to plaintiffs' federal constitutional claims, the Court of Appeals reversed the trial court's entry of summary judgment, concluding the Board could not assert sovereign immunity as a defense to plaintiffs' 42 U.S.C. § 1983 claims. However, in so holding, the court stated:

> The Board may not assert a defense of sovereign immunity against plaintiffs' constitutional § 1983 claims. We note that plaintiffs may not be entitled to monetary relief pursuant to § 1983 against defendant on grounds other than sovereign immunity. *Id.* (citing *Messick v. Catawba County,* 110 N.C. App. 707, 713-24, 431 S.E.2d 489, 493, *disc, review denied,* 334 N.C. 621, 435 S.E.2d 336 (1993)(holding that, because a county is not a "person" for purposes of a § 19S3 claim, it cannot be sued where the remedy sought is monetary damages)). As this appeal is limited to issues of sovereign immunity, we do not address the merits of such an argument.

Id. at 430-31, 581 S.E.2d at 93-94. Additionally, the Court of Appeals held that the Board is immune from plaintiffs' claim for punitive damages, and that

claim is not at issue here. Id. at 431, 581 S.E.2d at 94.

Following remand, on June 23, 2004, the Board filed a new Motion for Summary Judgment seeking judgment as a matter of law on all remaining non-constitutional claims on various grounds, including that the Board is immune from suit under the doctrine of sovereign/governmental immunity because the specific terms of its excess coverage policy excluded plaintiffs' claims, thereby preserving the Board's immunity. (R. pp. 86-89). On the same date, the Board additionally filed a Motion for Judgment on the Pleadings as to plaintiffs' constitutional claims on grounds that the Board is not an entity which can be sued for monetary damages under 42 U.S.C. § 1983, and that plaintiffs' complaint failed to state a constitutional claim for relief. (R. pp. 148-150).

On September 3, 2004, the trial court entered an Order granting both of the Board's motions and entering summary judgment in favor of the Board as to all remaining non-constitutional claims and judgment on the pleadings as to all claims arising under 42 U.S.C. § 1983 and the North Carolina Constitution. (R. pp. 171-72). Plaintiffs filed Notice of Appeal to the Court of Appeals on October 1, 2004. (R. p. 185-86).

Plaintiffs' appeal was heard in the Court of Appeals on August 23, 2005. The Board argued that the trial court correctly granted its motion for summary judgment as to all remaining non-constitutional claims because the plain terms of the

excess insurance policy, which excluded claims "arising out of the ownership, maintenance, operation, use, loading or unloading of any Automobile," excluded coverage for plaintiffs' claims, thereby preserving its governmental immunity to such claims. The Board additionally argued that the trial court properly entered judgment on the pleadings on plaintiffs' constitutional claims because the Board is not a "person" within the meaning of 42 U.S.C. § 1983; plaintiffs failed to argue or establish the absence of an adequate state remedy with respect to their state constitutional claims; and the allegations of plaintiffs' complaint failed as a matter of law to establish any act by the Board that would support a federal or state constitutional claim.

On March 7, 2006, the Court of Appeals filed an Opinion in this matter which is the subject of this Petition. (See Exhibit A). The appellate court concluded that the trial court erred in entering summary judgment on plaintiffs' non-constitutional claims under the automobile exclusion. Further, notwithstanding that plaintiffs had never moved for summary judgment, nor was summary judgment in favor of the plaintiffs ever addressed before the Court of Appeals, the court went so far as to remand for entry of judgment as a matter of law in plaintiffs' favor. The court did so without addressing any of the underlying merits of any claims, which had yet to even become an issue before the trial court, and without sufficiently specifying as to which claims the plaintiffs were entitled to judgment. With respect to the constitutional claims, the appellate court reversed judgment on the pleadings in favor of the Board, holding that the allegations of the complaint

were sufficient to state both federal and state constitutional claims; that the Board is not an agency of this State and is therefore a "person" within the meaning of 42 U.S.C. § 1983 such that plaintiffs may proceed with their federal constitutional claims; and that plaintiffs had no adequate state remedy such that they could proceed with direct claims against the Board under the state constitution.

Judge Eric Levinson concurred in the majority's conclusion that reversal of the trial court's entry of summary judgment on the non-constitutional claims was required, but dissented as to the majority's assessment of the constitutional claims. Judge Levinson concluded that plaintiffs failed to bring forth factual allegations which, taken as true, were sufficient to state a claim for relief under either the federal or state constitution. In so concluding, Judge Levinson did not address whether the Board is a "person" within the meaning of 42 U.S.C. § 1983 or whether plaintiffs possessed an adequate state remedy with respect to their state constitutional claims. Accordingly, Judge Levinson would have affirmed the entry of judgment on the pleadings in favor of the Board.

This matter now comes to this Court on the Board's Petition for Discretionary Review. The Board has contemporaneously appealed as of right the issues raised in Judge Levinson's dissent, as well as the substantial constitutional questions of whether the Board is a "person" within the meaning of 42 U.S.C. § 1983 and whether plaintiffs failed to establish the absence of an adequate state remedy

with respect to their state constitutional claims. The Board petitions for review the remaining issue of the reversal of summary judgment on plaintiffs' non-constitutional claims and the Court of Appeals' entry of "summary judgment" for plaintiffs on that issue. Additionally, in an abundance of caution, to the extent this Court disagrees that the issues concerning 42 D.S.C. § 1983 and adequate state remedies are substantial constitutional issues allowing for appeal of right under N.C. Gen. Stat. § 7A-30(1), the Board alternatively petitions for discretionary review of these issues.

To the extent the Court of Appeals' Opinion is interlocutory pursuant to Rule 15(h) of the Rules of Appellate Procedure, the Board specifically submits that failure to certify this matter for review "would cause a delay in final adjudication which would probably result in substantial harm to a party," as the crux of these issues involve the Board's entitlement to sovereign immunity, which this Court recognizes affects a substantial right warranting immediate appeal, see *Corum v. Univ. of North Carolina,* 330 N.C. 761, 413 S.E.2d 276, cert. *denied,* 506 U.S. 985, 121 L.Ed.2d 431 (1992), and substantial constitutional questions, including the Board's right, as an agency of this State, to be free from constitutional claims under 42 U.S.C. § X983, which constitutional issues should be immediately appealable under N.C. Gen. Stat. § 7A-30(1).

STATEMENT OF THE FACTS

Plaintiffs' complaint alleges that on the afternoon of March 9, 1998, Nicole Ripellino was

departing Clayton High School at the end of the school day. (R. p. 9). Ripellino was operating her 1989 Plymouth four-door vehicle on school property, traveling in a westerly direction along High School Drive, when a traffic control gate came in contact with her vehicle and allegedly caused her injury. (R. p. 9).

The Board, a county school administrative unit vested with the authority and duties under Chapter § 115C of the General Statutes, operates and maintains Clayton High School. (R. p. 37). Under the Board's excess liability policy, the same exclusions applied as under the Board's coverage agreement with the NCSBT. (R. pp. 100; 116, Section H). Under that agreement, the Board is not entitled to coverage for "any Claim arising out of the ownership, maintenance, operation, use, loading or unloading of any Automobile." (R. p. 78). This automobile exclusion applied to any potential coverage for either General Liability or Errors and Omissions under the coverage agreement, (R. p. 74).

REASONS WHY CERTIFICATION **SHOULD ISSUE**

Discretionary review of a decision of the Court of Appeals by the Supreme Court of North Carolina is warranted when: (1) the decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court; (2) the case involves legal principles of major significance to the jurisprudence of this State; or (3) the subject matter of the appeal has significant public interest. N.C. Gen. Stat. § 7A-31 (2006). In the present case, the

Board's Petition for Discretionary Review involves not only one basis upon which review may be granted, but all three statutory bases, rendering review of this matter particularly appropriate and essential.

I. THE BOARD'S PETITION SHOULD BE GRANTED, AS THE COURT OF APPEALS' OPINION IS IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT.

A. Non-constitutional claims: the Court of Appeals' Opinion conflicts with Supreme Court precedent regarding the application of sovereign immunity and the appropriate scope of appellate review.

The law is well-established that the Board is entitled to sovereign immunity to the extent it has not waived such immunity through the purchase of insurance. See N.C. Gen. Stat. § 115C-42 (2006) ; *Evans v. Housing Authority of City of Raleigh,* 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004); *Dawes v. Nash County,* N.C. 442, 445, 584 S.E.2d 760, 762 (2003) . Significantly, however, "' [i]mmunity is waived only to the extent that the [county] is indemnified by the insurance contract from liability for the acts alleged.'" *Dawes,* 357 N.C. at 446, 584 S.E.2d at 763 (citation omitted); see *also, e.g., Evans,* 359 N.C. at 57, 602 S.E.2d at 673 (governmental entity "waives its immunity only to the extent of the insurance obtained."); *Luhmann v. Hoenig,* N.C. 529, 533, 597 S.E.2d 763, 766 (2004) (county entity can

only waive immunity "to the extent of [its] insurance coverage."). Thus, where immunity is applicable, if the plaintiff's allegations remove a claim from coverage under the governmental entity's policy, there is no waiver of immunity. *Lyles v. City of Charlotte,* 344 N.C. 676, 682, 477 S.E.2d 150, 154 (1996).

Moreover, this Court has repeatedly emphasized that "'[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.'" *Meyer v. Walls,* 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citation omitted) (emphasis added); *see also, e.g., Selective Ins. Co. of the Southeast v. NCNB Nat. Bank of North Carolina,* 324 N.C. 560, 564, 380 S.E.2d 521, 524 (1989); *Guthrie v. North Carolina State Ports Authority,* 307 N.C. 522, 537, 299 S.E.2d 618, 627 (1983). This rule of strict construction against waiver of immunity clearly applies to any interpretation and application of G.S. § 115C-42.

Here, the Court of Appeals' holding that the Board waived its sovereign immunity is contrary to the principles enumerated by this Court that immunity can only be waived to the extent the Board will actually be indemnified for the loss under the plain terms of its excess insurance policy, and the requirement that any such waiver be strictly construed. The Court of Appeals concluded that the Board waived its sovereign immunity because plaintiffs' claims did not fall within the automobile exclusion, excluding coverage for "any Claim arising

out of the ownership, maintenance, operation, use, loading or unloading of any Automobile." (R. p. 78). The court so concluded despite the plain allegations of plaintiffs' complaint that at the time of injury, Ripellino was "attempting to depart Clayton High School" while "operating a 1989 Plymouth four-door vehicle," and that at the time the traffic control gate allegedly closed, she was traveling in a westerly direction in her vehicle on High School Drive. (R. p. 9) (emphasis added).

In so holding, the Court of Appeals relied on this Court's decision in State Capital *Ins. Co. v. Nationwide Mut. Ins. Co.,* 318 N.C. 534, 350 S.E.2d 66 (1986), for the proposition that the automobile must be the proximate cause of the injury for such an exclusion to apply, and that because there was no "action or omission by plaintiffs' automobile" causing the injury, the exclusion does not apply. First, a plain reading of State *Capital* does not support the Court of Appeals' reasoning that there must have existed some "action or omission by plaintiffs' automobile" in order for the exclusion to apply. Second, however, and most significantly, a thorough reading of that decision reveals that this Court's holding in that case is expressly limited strictly to exclusions contained in homeowner's policies under considerations unique to such policies and what they are intended to cover, particularly when construed in conjunction with an insured's automobile policy. At no point does this Court in *State Capital* so much as hint that the same principles are applicable to a general liability policy, let alone a general liability policy of a governmental

entity where issues of sovereign immunity and G.S. § 115C-42 are implicated.

In fact, the Court of Appeals itself has previously aptly recognized that cases involving other types of insurance coverage "are not controlling" in an action which "concerns a public school board which is protected by sovereign immunity." tester *by Carlisle v. Nash/Rocky Mount Bd. of Educ,* 124 N.C. App. 400, 404, 477 S.E.2d 246, 249 (1996) . Thus, in *Vaster,* consistent with the dictates of this Court, the Court of Appeals appropriately recognized a different need to strictly construe any potential waiver of governmental immunity which does not apply in the typical insurance coverage dispute. *Id.* at 405, 477 S.E.2d at 249. Indeed, the Court of Appeals has consistently held that exclusionary clauses in school boards' coverage policies (and in some cases, the very exclusionary language at issue here) must be strictly construed against waiver when assessing a board's potential waiver of immunity under G.S. § 115C-42. See *Herring ex rel. Marshall v. Winston-Salem/Forsyth County Bd. of Educ,* 137 N.C. App. 680, 689, 529 S.E.2d 458, 465, disc, *review denied,* 352 N.C. 673, 545 S.E.2d 423 (2000); *Beatty v. Charlotte-Mecklenburg Bd. of Educ.* , 99 N.C. App. 753, 756, 394 S.E.2d 242, 244 (1990); *Overcash v. Statesville City Bd. of Educ,* 83 N.C. App. 21, 26, 348 S.E.2d 524, 527 (1986). Significantly, with the exception of Overcash, these cases were decided post-State *Capital,* and this Court, despite opportunity to review these issues and hold *State Capital* applicable in this context, has declined to do so.

In the present case, the Court of Appeals did not so much as mention this Court's dictate that any waiver of immunity must be strictly construed and not lightly inferred, and gave absolutely no regard to the unique circumstances under which this issue of coverage interpretation arises. Remarkably, and curiously, the court does not even reference any of its own multiple prior decisions addressing interpretations of exclusions in this very context, relying instead on the general principles of State *Capital* which were expressly limited to the context of homeowner's policies where sovereign immunity was not implicated, and which case has never been applied in this context. The court's holding thus not only directly contravenes decisions of this Court enumerating the unique principles applicable to waiver of immunity, but also implicates this Court's dictate that one panel of the Court of Appeals may not overrule another panel of that court on the same issue presented. *Matter of Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act,* 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Here, the Court of Appeals entirely disregarded its own prior authority that the issue of immunity under G.S. § 115C-42 alters the considerations and appropriate analysis from those in a general insurance coverage dispute, such as in State *Capital*, and requires a strict construction against any waiver of sovereign immunity.

However, even if the general principles enumerated in *State Capital* were equally applicable to cases involving a general liability policy of a governmental entity in the context of assessing a potential waiver of sovereign immunity, which,

under the express terms of that decision, they clearly are not,[4] the Court of Appeals' decision would nevertheless be erroneous. The Court of Appeals concluded that the automobile was not the proximate cause of plaintiffs' injuries; however, the facts are clear that the incident at issue would not have occurred but for Ripellino's operation and/or use of the automobile. Contrary to plaintiffs' argument to the Court of Appeals that Ripellino would have sustained the same injuries had she been on foot, which that court unfortunately accepted, Ripellino would not have come in contact with the traffic control gate had she not been operating her automobile in the outbound traffic lane of High School Drive. As alleged in the complaint, High School Drive had a sidewalk for bikers and pedestrians, and there is no reason why Ripellino would have foreseeably been standing on foot in the middle of the outbound lane of traffic on High School Drive in the path of a traffic control gate. In any event, these were not the facts of this case. As alleged in the complaint, the gate was for the sole purpose of traffic control, and did not operate over the sidewalk, but lowered over the street where automobile traffic flowed on High School Drive. Ripellino would not have foreseeably been in the path of that traffic control gate but for the fact that she was operating an automobile in the outbound

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[4] Indeed, discretionary review of these issues is appropriate simply based on the need for clarification of the extent to which *State Capital*, a frequently cited case, applies outside the context of homeowner's policies

traffic lane of High School Drive. Under these undisputed facts, there is simply no way to separate plaintiffs' injuries from Ripellino's operation/use of the automobile, bringing it squarely within the automobile exclusion, against waiver of sovereign immunity.

Additionally, the Court of Appeals' holding in this regard, which not only reversed the trial court's entry of summary judgment in favor of the Board on plaintiffs' non-constitutional claims, but purported to remand for entry of summary judgment in favor of plaintiffs, clearly exceeded the court's appropriate scope of review and ran afoul of this Court's dictate that its holdings be clear and "readily understandable to the bench and bar." *See Maraman v. Cooper Steel Fabricators,* 355 N.C. 482, 483, 562 S.E.2d 420, 421 (2002). As this Court recently emphasized, our Rules of Appellate Procedure are mandatory, and the Court of Appeals shall not exercise its discretion to review issues which have not been properly preserved throughout the appellate process. *Viar v. North Carolina Dept. of Transp.,* 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005).

This Court has repeatedly held, under the plain dictate of Rule 10(a) of the North Carolina Rules of Appellate Procedure, "the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman,* 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991). Even more basic, under Rule 10(b)(1), "issues occurring during trial must be preserved if they are to be reviewed." *Keep v. Beck,*

360 N.C. 34, 36-37, 619 S.E.2d 497, 499 (2005). The appellant must "'have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make.'" Id. (citing N.C. R. App. P. 10(b)(1)).

In the present case, plaintiffs never moved for summary judgment as to any of their claims; plaintiffs never requested entry of summary judgment in their favor, and the trial court never denied any request or motion by plaintiffs for entry of summary judgment in their favor on any of their claims. Nor were any such issues made the basis of any assignment of error to the Court of Appeals. {R. p. 187} . It is evident from the Record on Appeal that the only issue that has ever been addressed with respect to summary judgment on plaintiffs' non-constitutional claims is the Board's ability to assert the defense of sovereign immunity. However, even if the Board is not entitled to assert immunity, this in no manner equates to plaintiffs' entitlement to summary judgment on these claims. Indeed, discovery in this matter has yet to conclude, and the merits of plaintiffs' non-constitutional claims have yet to even be addressed by the trial court. That the Court of Appeals has remanded for entry of summary judgment in favor of plaintiffs on these claims is inconceivable given that the merits of these claims have not been addressed by the trial court, were not examined or addressed by the Court of Appeals, and plaintiffs have never moved for summary judgment with respect to these claims. Clearly, such a holding flies in the face of this Court's precedent and the mandatory Rules of Appellate Procedure.

One can only assume the Court of Appeals did not intend to order entry of "summary judgment" in favor of plaintiffs on these claims, but only direct that the trial court order as a matter of law that the Board cannot assert the defense of sovereign immunity for claims in excess of $100,000, which essentially equates to a denial of the Board's motion for summary judgment. To this extent, the Court of Appeals' Opinion conflicts with this Court's admonishment that it "is once again reminded of its responsibility to issue opinions in which the holding is readily understandable to the bench and bar. [and not) confusing and inappropriate." *Maraman,* 355 N.C. at 483, 562 S.E.2d at 421. At the least, review of this issue should be granted in order to clarify the Court of Appeals' "confusing and inappropriate" holding with respect to the entry of "summary judgment" in favor of plaintiffs on these claims.

B. Constitutional claims; the Court of Appeals' Opinion conflicts with Supreme Court precedent regarding the nature of the Board as an agency of the State for purposes of 42 U.S.C. § 1983 and the prerequisite to a state constitutional claim that no adequate state remedy exist.

1. Federal Constitutional Claims

This Court has held that neither the State of North Carolina nor its respective agencies are "persons" within the meaning of 42 U.S.C. § 1983

when the remedy ' sought is monetary damages. *Corum,* 330 N.C. at 771, 413 S.E.2d at 282-83. However, in this case, the Court of Appeals held, in what it deemed an issue of first impression, that the Board is a "person" within the meaning of 42 U.S.C. § 1983 because the Board is not considered an agency of this State. In so concluding, the appellate court noted that there is conflicting authority from this Court as to whether the Board is such a state agency. At the least, therefore, review of this issue is essential for clarification of what the Court of Appeals perceived to be an inconsistency in this Court's precedent on this issue.

Regardless of any such perceived inconsistency, review of this issue is warranted because the lower court's conclusion in this regard is simply not supported by the precedent of this Court.[5] As early as 1898, this Court recognized that a State office is the equivalent of an agency of the State, said office having been bestowed with the sovereign functions of government. *Barnhill v. Thompson,* 29 S.E. 720, 721 (1898) . This Court specifically held in *Barnhill* that a member of a local board of education holds a "public" office. *Id.* This Court reaffirmed this holding well over fifty years later in *Edwards v. Bd. of Bduc. of Yancey County,* 235 N.C. 345, 70 S.E.2d 170 (1952), wherein it expressly stated that a

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[5] Should this issue be accepted for review by the Court, the Board will detail more fully the constitutional and statutory bases requiring a conclusion that the Board is an agency of the State, but for purposes of this petition shall confine its argument to Supreme Court precedent on this issue.

"member of the county board of education holds a public office under the State." Id. at 351, 70 S.E.2d at 174 (emphasis added). Accordingly, under these unambiguous holdings, a local board of education is a state office, and is therefore a state agency that cannot, under *Corum,* be a "person" under the framework of 42 U.S.C. § 1983.

Additionally, this conclusion is supported by the framework enumerated by this Court for determining whether a position established by statute constitutes a "state office." *See Harris v. Watson,* 201 N.C. 661, 667, 161 S.E. 215, 218 (1931); *McCullough v. Scott,* 109 S.E. 789, 792-93 (1921). Should review be granted, the Board will demonstrate unto this Court how it fits within this framework as established by numerous provisions of Chapter 115C of our General Statutes.

Moreover, this Court has reaffirmed the principles behind various statutory provisions which go beyond simply establishing the existence of local boards, but define them as a school administrative unit and subdivision of the state-wide public school system charged with carrying out the duties of the State:

> [t]he public school system, including all its units, is under the **exclusive control of the State,** organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable. When functioning within this sphere, the units of the

> public school system do not exercise derived powers such as are given to a municipality for local government, so general as to require appropriate limitations on their exercise; they express the immediate power of the State, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution and under its direct delegation.

Bridges v. City of Charlotte, 221 N.C. 472, 478, 20 S.E.2d 825, 830 (1942) (emphasis added).

More recently, in *Rowan County Bd. of Education v. U.S. Gypsum Co.,* 332 N.C. 1, 418 S.E.2d 648 (1992), this Court held that when a local school board carries out the duties imposed on it under G.S. § 115C-44, it acts as "an arm of the state." *Id.* at 10-11, 418 S.E.2d at 655 (emphasis added). In that case, the Rowan County Board of Education brought suit against a contractor twenty-four years after the last installation of asbestos containing materials in one of its schools. Jd. at 6, 418 S.E.2d at 652. The contractor argued that Rowan County's suit was barred by the statute of repose because the doctrine of *nullum tempus* (time does not run against the sovereign) did not apply to a local board of education, which was not engaged in a governmental function. This Court disagreed, stating:

> Given that the State (1) has undertaken the responsibility to provide free public

> schools, (2) has delegated day-to-day administration and operation of those schools to counties and local school boards, including the power to bring suit to recover money or property "which may be due to or should be applied to the support and maintenance of the schools' and (3) has retained the duty of providing those local entities with considerable operating funds from state revenues, we hold that .Rowan, in the matters at issue, was acting as an arm of the State and pursuing the governmental function of constructing and maintaining its schools.

Rowan, 332 N.C. at 10-11, 418 S.E.2d at 655 (emphasis added) . Accordingly, when a local board of education is performing a governmental function, imposed upon it by statute, it acts as an arm of the State. *See also Hoke County Bd. of Educ. v. State,* 358 N.C. 605, 649, 635, 599 S.E.2d 365, 397, 389 (2004) (confirming that responsibility for any failure of local board of education to provide county students with equal opportunities in education ultimately rests with the State, the entity "that created the school board and that authorized the school board to act on the State's behalf,").

Further yet, this Court has, on more than one occasion, held that unless a local board of education waives its immunity in the statutorily prescribed manner, it "is not liable in a tort action or proceeding involving a tort except such liability as may be established under our Tort Claims Act." *Fields v.*

Durham City Bd. of Educ, 251 N.C. 699, 700-701, 111 S.E.2d 910, 911-12 (1960) (emphasis added); *see also Eller v. Bd. of Educ,* 242 N.C. 584, 89 S.E.2cJ 144 (1955). Thus, this Court has acknowledged that the Board may be subject to liability under the Tort Claims Act, and it is statutorily established that such Act only applies to "tort claims against . . . departments, institutions and agencies of the State." N.C. Gen. Stat. § 143-291 (2006). Although the Court of Appeals cited this Court's decision in Turner *v. Gastonia City Bd. of Educ,* 250 N.C. 456, 109 S.E.2d 211 (1959) (which did not even address the exact issues presented by this case) , for the proposition that the Tort Claims Act does not apply to the Board, one year after Turner, this Court resolved any ambiguity in that issue, clearly and unambiguously holding that the Act does apply to claims against a local school board. See *Fields,* 251 N.C. at 700-701, 111 S.E.2d at 911-12.

Having acknowledged at least some of the foregoing decisions of this Court, which, obviously, cannot support a conclusion that the Board is not a state agency, the Court of Appeals purported to simply dispose of these unambiguous holdings with the statement that "precedent is unclear whether school boards are considered part of the State." For these reasons, this Court's review of this issue is essential.

Moreover, as with plaintiffs' non-constitutional claims, the court's decision in this regard again runs afoul of this Court's dictate that the Court of Appeals cannot overrule its own prior holdings *on* the same issue. To this extent, the Court

of Appeals in this very case, has already indicated that the Board is not a "person" within the meaning of 42 U.S.C. § 1983. *Ripellino,* 158 N.C. App. at 430-31, 581 S.E.2d at 94. Although sovereign immunity was the dispositive issue on that appeal, the court believed the instant issue significant enough that it was compelled to plainly state "that plaintiffs may not be entitled to monetary relief pursuant to section 1983 against defendant on grounds other than sovereign immunity." Jd. In so indicating, the court relied upon its prior holding in *Messick v. Cabawba County,* 110 N.C. App. 707, 431 S.E.2d 489, *disc, review denied,* 334 N.C. 621, 435 S.E.2d 336 (1993), which clearly held that counties are not "persons" within the meaning of § 1983 where the remedy sought is monetary damages. *See also, e.g., Peverall v. County of Alamance,* 154 N.C. App. 426, 433, 573 S.E.2d 517, 521 (2002), *disc. review denied,* 356 N.C. 676, 577 S.E.2d 632 (2003). Despite opportunity to do so on *certiorari* in *Ripellino I,* or discretionary review in *Messick* and *Peverall* (both also standing for the proposition that counties are not persons within the meaning of 42 U.S.C. § 1983), this Court has declined to alter these holdings, which should have been binding on the Court of Appeals here.

2. State Constitutional Claims

Finally, the Court of Appeals' decision with respect to plaintiffs' state constitutional claims conflicts with this Court's precedent in *Corum* that such claims may proceed only in the absence of an adequate state remedy. *Corum,* 330 N.C. at 782-83, 413 S.E.2d at 289-90. First and foremost, plaintiffs never alleged in their complaint as a part of their

state constitutional claims that they lacked an adequate state remedy, a fact which the Court of Appeals failed to note. As our appellate courts have recognized, this is an "an essential element" of a state constitutional claim, *Swain v. Blfland,* 145 N.C. App. 383, 390, 550 S.E.2d 530, 536, cert, *denied,* 354 N.C. 228, 554 S.E.2d 832 (2001), and thus, the trial court's entry of judgment on the pleadings in favor of the Board on this issue was required on this basis alone. Moreover, plaintiffs did not raise this issue in their Brief to the Court of Appeals, which that court also failed to note, thereby necessarily abandoning any such argument on appeal that they lacked an adequate state remedy. *See Viar,* 359 N.C. at 401-402, 610 S.E.2d at 361. As addressed above in subsection A, the Court of Appeals' consideration of issues not properly preserved for appellate review is directly contrary to this Court's precedent and our mandatory Rules of Appellate Procedure.

Second, the basis of the Court of Appeals' holding that plaintiffs did not possess any such adequate remedy and could proceed against the Board directly under the state constitution was the mistaken rationale that there is no state remedy for the Board's alleged unequal application of its entitlement to immunity, as separate and apart from plaintiffs' negligence claim. However, as the Board argued before the Court of Appeals, "the existence of an adequate alternate remedy is premised on whether there is a remedy available to plaintiff for the violation, not on whether there is a right to obtain that remedy from the State in a common law tort action." *Rousselo v. Starling,* 128 N.C. App. 139,

448, 495 S.E.2d 725, 731 (emphasis added), disc, *review denied,* 348 N.C. 74, 505 S.E.2d 876 (1998). Accordingly, the dispositive issue is whether there exists a state law cause of action which could compensate plaintiffs for their alleged constitutional injury; it is immaterial whether plaintiffs could prevail by asserting that cause of action.

In holding there was no such adequate remedy because plaintiffs' negligence claim could not compensate for the Board's alleged unequal assertion of the immunity defense, the Court of Appeals failed to recognize that if plaintiffs' negligence claim were successful, i.e., plaintiffs were entitled to recover damages from the Board on that claim, plaintiffs would not be entitled to compensation for any unequal assertion of immunity, as that defense could not have applied to plaintiffs by virtue of their successful recovery in negligence. In other words, plaintiffs would not be entitled to recover for the Board's unequal assertion of immunity unless they were damaged thereby. However, if plaintiffs were successful in their negligence claim, plaintiffs could not have been so damaged, as immunity would not have acted as a bar to their claim for recovery. Accordingly, if successful, plaintiffs' negligence claim would indeed adequately compensate plaintiffs for every damage they suffered in this case, as plaintiffs would recover with respect to the Board's alleged actions or omissions regarding the traffic gate, and would not have suffered any damage by virtue of the Board's assertion of immunity. Thus, even if plaintiffs had preserved this issue for appellate review, the Court

of Appeals' holding directly contravenes the principles set forth by this Court in *Corum,*

II. THE BOARD'S PETITION SHOULD BE GRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS ERRONEOUSLY APPLIES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE, INCLUDING THOSE OF SOVEREIGN IMMUNITY, THE APPROPRIATE SCOPE OF APPELLATE REVIEW, THE NATURE OF A LOCAL BOARD OF EDUCATION AS AN AGENCY OF THE STATE, AND THE PREREQUISTIES TO STATING A CLAIM UNDER OUR STATE CONSTITUTION.

A. Sovereign Immunity

This Court has recognized that the doctrine of sovereign immunity is "firmly embedded" in our jurisprudence, *Koontz v. City of Winston-Salem,* 280 N.C. 513, 529, 186 S.E.2d 897, 908 (1972), having been applied by our courts for well over a century, *Steelman v. City of New Bern,* 279 N.C. 589, 184 S.E.2d 239 (1971). As this Court observed in *Corum,* the doctrine is "firmly established in the law of our State today and has been recognized by the General Assembly as the public policy of the State." *Corum,* 330 N.C. at 785, 413 S.E.2d at 291. Noting that the doctrine has been modified, but never abolished, this Court recognized its essential function and the fact that our courts necessarily "defer[] to the legislature

the determination of those instances in which the sovereign waives its traditional immunity." Id.; see *also, e.g., Steelman,* 279 N.C. at 594, 184 S.E.2d at 242 (recognizing doctrine as "public policy of the State" and "firmly established in our law today."). Clearly, the doctrine of sovereign immunity embodies principles of major significance to our jurisprudence, and has done so for well over a century. This fact alone warrants review of the Court of Appeals' holding that the Board is not entitled to assert such a defense.

B. Scope of Appellate Review

Equally well-established in our jurisprudence is the principle expressed by this Court that "rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties." *Pruitt v. Wood,* 156 S.E. 126, 127 (1930). As this Court recently noted in *Viar,* "the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar,* 359 N.C. at 402, 610 S.E.2d at 361. Additionally, this Court has emphasized that "'[t]he preservation of the due administration of justice and the integrity and independence of the judiciary is one of the most important responsibilities of this Court. History has taught that without it, all else fails.'" *In re Inquiry Concerning a Judge,* 356 N.C. 389, 406, 584 S.E.2d 260, 270 (2002) (citation omitted).

As addressed herein, the Court of Appeals' purported entry of summary judgment in favor of

plaintiffs on their non-constitutional claims runs afoul of the well-established rules of appellate procedure which define the appropriate scope of appellate review, and the court's ambiguous and unclear holding in this regard fails to effectively and fairly administer justice. As these principles are, for obvious reasons, of major significance to the effective and fair functioning of our jurisprudence, review of the Court of Appeals' holding on this issue is especially warranted.

C. Constitutional Claims

Pending review, the Board has yet to address the extensive constitutional and statutory framework which demonstrates the intended nature of the Board as an agency of the State. However, as will be demonstrated should review be granted, such framework does exist, and there can be no more significant principle to our jurisprudence than our courts' responsibility to properly interpret and uphold the provisions of our constitution and the laws as enacted by our legislature. As addressed herein, and as will be further proven in more detail upon review, the Court of Appeals' holding that the Board is not an agency of this State fails to uphold our courts' duty to properly effectuate the constitutional and statutory provisions of this State. Likewise, as set forth herein, the court's conclusion with respect to plaintiffs' state constitutional claims also violates the legal principle of major significance to this State that our courts are to properly interpret and administer claims under our state constitution.

III. THE BOARD'S PETITION SHOULD BE GRANTED BECAUSE THIS CASE INVOLVES ISSUES OF SIGNIFICANT PUBLIC INTEREST, INCLUDING PRESERVATION OF A UNIFORM SYSTEM OF PUBLIC SCHOOLING ADMINISTERED BY THE STATE, PRESERVATION OF THE DOCTRINE OF SOVEREIGN IMMUNITY, AND THE INTEGRITY OF OUR STATE JUDICIAL PROCESS.

Clearly, the citizens of this State maintain a significant interest in ensuring, through its counties, uniform administration of a system of public schooling throughout this State. In noting that the issue of the maintenance of our public education system concerns "an issue of significant . . . public interest," this Court recently noted "the necessity that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience." *Hoke County Bd. of Educ,* 358 N.C. at 649, 599 S.E.23 at 397 (emphasis added). This Court observed its prior holding in *Leandro v. State,* 346 N.C. 336, 488 S.E.2d 249 (1997), that the children of North Carolina have an equal right to avail themselves of the opportunity for a sound basic education, based upon Article IX, Section 2(1) of the North Carolina Constitution, which directs that "'[t]he General Assembly shall provide ... for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.'" *Id.*

at 621-22, 599 S.E.2d at 380 (citation omitted) (emphasis added). Significantly, in *Bake,* this Court upheld the trial court's determination that responsibility for any failures in this regard of the Hoke County School Board ultimately rested with the State, the entity "that created the school board and that authorized the school board to act on the State's behalf." *Id.* at 635, 599 S.E.2d at 389.

Moreover, as early as 1884, this Court noted that the purpose of local county governments is "to effectuate the political organization and civil administration of the state," including in matters of education, and they "are indeed a necessary part and parcel of the subordinate instrumentalities employed in carrying out the general policy of the state in the administration of government." *White v. Commissioners of Chowan County,* 90 N.C. 437 (1884). As will be addressed more fully should this Court grant review, the statutory framework and case law relevant to county boards of education have clearly defined such boards as public offices, and thereby state agencies, specifically in order to effectuate these important public policy goals. The Court of Appeals' conclusion that county boards of education do not function as agencies of this State is contrary to this important public policy.

Further, as noted above, this Court has expressly held on more than one occasion that the doctrine of sovereign immunity is "the public policy of the State." *Steelman,* 279 N.C. at 594, 184 S.E.2d at 242; *see also Corum,* 330 N.C. at 785, 413 S.E.2d at 291. In fact, this Court has noted that although "a bill was introduced in the 1971 General Assembly to

abolish governmental immunity in its entirety, [] this bill failed to pass." *Steelman,* 279 N.C. at 595, 184 S.E.2d at 243. This Court has specifically held that any such modification of the doctrine must necessarily "come from the General Assembly, not this Court." *Id.* In this regard, the doctrine "embodies a respect for the positions of two coequal branches of government - the legislature and the judiciary." *Id.* The public necessarily maintains a significant interest in "the public policy of the State" and in preservation of the fundamental system of checks and balances between our legislative and judicial branches of government. Unfortunately, if left undisturbed by this Court's full review, the Court of Appeals' Opinion will have a severely adverse impact upon the public policies of boards of education across our state.

Finally, our courts have often noted the significant public interest of instilling the public confidence in our judicial system. *See*, e.g., *Lange v. hange,* 167 N.C. App. 426, 437, 605 S.E.2d 732, 738-39 (2004) ("our zealous guarding of the trust reposed in our judiciary by the public warrants, at times, our erring on the side of caution, and even extreme caution, lest the shadow of suspicion fall over its integrity."); *Rhyne* v. *K-Mart Corp.,* 149 N.C. App. 672, 695, 562 S.E.2d 82, 98 (2002) (Greene, J., dissenting) ("ensuring public confidence in the judicial system are legitimate state interests."), *affirmed,* 358 N.C. 160, 594 S.E.2d 1 (2004). As addressed herein, the Court of Appeals' Opinion in this case, which in some respects exceeded its authority, in some respects was confusing and ambiguous, and in some respects, simply erroneous

and in contravention to Supreme Court precedent, functions to undermine the bar's and the public's confidence in the fair and efficient administration of appellate justice. For the foregoing reasons, the issues presented by the Board's petition invoke significant public policy concerns warranting this Court's review.

ISSUES TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Board intends to present the following issues for review in addition to those raised in the dissenting opinion;

> I. Whether the Court of Appeals erred in reversing summary judgment in favor of the Board on grounds that the Board waived its sovereign immunity as to plaintiffs' non-constitutional claims?
>
> II. Whether the Court of Appeals erred in entering summary judgment in favor of plaintiffs on their non-constitutional claims where that issue was not properly preserved for appellate review?
>
> III. Whether the Court of Appeals erred in concluding that the Board is not an agency of the State and is therefore a "person" within the meaning of 42 U.S.C. § 1983 such that it can be

subject to claims under the federal constitution?

IV. Whether the Court of Appeals erred in concluding that plaintiffs lacked an adequate state remedy such that plaintiffs can proceed against the Board with a direct claim under the state constitution?

V. Whether the Court of Appeals erred in failing to affirm the trial court's entry of summary judgment and judgment on the pleadings in favor of the Board?

CONCLUSION

For the reasons set forth herein, the Board respectfully requests that its Petition for Discretionary Review be granted.

This the /6th/ day of April, 2006.

CRANFILL, SUMNER & HARTZOG, L.L.P.

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No. 180A06 ELEVEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO

v

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, ET AL

From Johnston

NOTICE OF APPEAL
(Dissent)
(The N.C. School Boards Association)
(Filed 11 April 2006)
and
PETITION FOR DISCRETIONARY REVIEW
AS TO ADDITIONAL ISSUES
(The N.C. School Boards Association)
(Filed 11 April 2006)
(Allowed 29 June 2006)

NO. /180A06 ELEVEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,
Plaintiffs - Appellants,

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants-Appellees.

FROM JOHNSTON COUNTY
No. 01 CVS 609
COA04-1681

NOTICE OF APPEAL

The Defendants-Appellees, denominated in the Complaint as "The North Carolina School Boards Association, Incorporated; the North Carolina School

Boards Trust, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1982 North Carolina School Boards Association Self-Funded Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; and 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated" (hereinafter collectively "Trust Defendants"), hereby give notice of appeal to the Supreme Court of North Carolina, pursuant to N.C. Gen. Stat. § 7A-30(2) where the Court of Appeals opinion (COA04-1S81) was entered with a dissenting opinion by Judge Levinson based on the following issues:

> WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S GRANTING OF JUDGMENT ON THE PLEADINGS UNDER RULE 12 (c) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE IN FAVOR OF THE DEFENDANTS WITH RESPECT TO PLAINTFF'S CLAIM UNDER THE FEDERAL AND STATE CONSTITUTIONS WHERE THE PLAINTIFF'S ALLEGATIONS FAIL

TO STATE A CLAIM FOR RELIEF UNDER EITHER CONSTITUTION?

Additionally, the Trust Defendants hereby give notice of appeal to the Supreme Court of North Carolina, pursuant to N. C. Gen. Stat. § 7A-30(1), to those portions of the Court of Appeals' Opinion not the subject of Judge Levinson's dissent which directly involve substantial questions arising under the federal and state Constitutions, including whether the majority's conclusions that a local board of education is a "person" within the meaning of 42 U.S.C § 1982 such that it may be held liable for alleged violations of plaintiffs' federal equal protection and due process rights (U.S. Cost. Amd. XIV; U.S. Const. Admedn XIV, § 1); and the majority's conclusion that plaintiffs could proceed with their state constitutional claims in the absence of an adequate state remedy (N.C. Cost. art. I, § 19). The Trust Defendants additionally appeal the following issues of right:

WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE BOARD IS NOT AN AGENCY OF THE STATE AND IS THEREFORE A "PERSON" WITHIN THE MEANING OF 42 U.S.C. § 1983 SUCH THAT IT CAN BE SUBJECT TO CLAIMS UNDER THE FEDERAL CONSTITUTION?

WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT PLAINTIFFS LACKED AN

ADEQUATE STATE REMEDY SUCH THAT PLAINTIFFS CAN PROCEED WITH A DIRECT CLAIM UNDER THE STATE CONSTITUTION.[6]

Pursuant to Rule 14 (b)(2), the Trust Defendants submit these constitutional issues were timely raised before the trial court in their Motion for Judgment on the pleadings and before the North Carolina Court of Appeals. The Trust Defendants submit that that its rights have been violated inasmuch as the law establishes that a local board of education is an arm of the State immune from federal constitutional claims under 42 U.S.C. § 1983, and cannot be subject to liability under the state constitution where plaintiffs possess an adequate state remedy; and that the Court of Appeals has found that the claims against the Trust Defendants to be related to and contingent upon the claims against the School Board.

Respectfully submitted, this /11th/ day of /April/, 2006.

YATES, McLAMB & WEHYER, L.L.P

By: /s/Barbara B. Weyher
Barbara B. Weyher
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---

[6] The Trust Denats have also separately filed a Petition for Discretionary Review encompassing these issues.

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NO. ELEVEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,
Plaintiffs - Appellants,

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,
Defendants-Appellees.

FROM JOHNSTON COUNTY
No. 01 CVS 609
C0A04-1681

PETITION FOR DISCRETIONARY REVIEW PURSUANT TO N.C.G.S § 7A-31

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NO. ELEVEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO,

Plaintiffs - Appellants,

v.

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, a division and/or department of, created and administered by THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, a division and/or department of, created and administered by, THE NORTH CAROLINA SCHOOL BOARDS

ASSOCIATION, INCORPORATED, and THE JOHNSTON COUNTY BOARD OF EDUCATION,

Defendants-Appellees.

FROM JOHNSTON COUNTY
No. 01 CVS 609
COA04-1681

PETITION FOR DISCRETIONARY REVIEW PURSUANT TO N.C.G.S § 7A-31

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Defendants-Appellees, denominated in the Complaint as "The North Carolina School Boards Association, Incorporated; the North Carolina School Boards Trust, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1982 North Carolina School Boards Association Self-Funded Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated; and 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund, a division and/or department of, created and administered by, the North Carolina School Boards Association, Incorporated" (the "Trust Defendants"), respectfully petition the Supreme

Court of North Carolina to certify for discretionary review a portion of the order of the Court of Appeals, which overruled the trial court's granting of the Trust Defendants' and the Johnston County Board of Education's Motion for Judgment on the Pleadings. The Trust Defendants submit that this petition should be granted, pursuant to N.C. Gen. Stat. § 7A-31 (2005), on the grounds that (1) the decision of the Court of Appeals appears likely to be in conflict with prior decisions of the Supreme Court, and (2) the cause involves legal principles of major significance to the jurisprudence of this State.

Trust Defendants also incorporate the Notice of Appeal filed simultaneously with this Petition, whereby Trust Defendants have a right of appeal pursuant to N.C. Gen. Stat. § 7A-30 (2005) on the issues contained in the Court of Appeals' dissenting opinion.

FACTS AND PROCEDURAL HISTORY

Plaintiffs Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino (the "Plaintiffs") brought several actions against the Trust Defendants and the Johnston County Board of Education (the "School Board") after Nicole Ripellino and her vehicle were struck by a traffic control gate at Clayton High School. Plaintiffs' complaint included (1) a negligent personal injury action, (2) claims for medical expenses, (3) a declaratory judgment that the School Board had waived its immunity, (4) unfair and deceptive trade practices allegations, (5) claims for damages under 42 U.S.C. § 1983 due to denials of due process and equal

protection under the Federal and State Constitutions, and (6) claims for punitive damages.[1]

Previously, this case was heard before the Court of Appeals on issues involving sovereign immunity. The Court ruled that the School Board had only partially waived its sovereign immunity, but that the School Board could not use sovereign immunity as a defense to the Constitutional and 42 U.S.C. § 1983 claims. *See Ripellino v. North Carolina School Boards Ass'n, Inc.,* 158 N.C. App. 423, 581 S.E.2d 88 (2003) *(Ripellino I), cert. denied*, 358 N.C. 156, 592 S.E.2d 694 (2004). The Court also reversed as to the Trust Defendants because "the claims against the trust defendants are related to and contingent upon the claims against the board. *Id.* at 431, 581 S.E.2d at 94.

When the case was remanded to the trial court, the School Board and the Trust Defendants filed motions for Summary Judgment on all the non-constitutional claims and motions for Judgment of the Pleadings, pursuant to Rule 12 (c) of the North Carolina Rules of Civil Procedure, on the claims regarding 42 U.S.C § 1983 and the Federal and State

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[1] Of these claims, only the 3rd, 4th, and 5th claims were brought against the Trust Defendants. The claims for declaratory judgment were resolved in the first appeal of this case. The claim for unfair trade practices was dismissed by the trial court, with no appeal taken by the plaintiff. Accordingly, the only remaining claims against the Trust Defendants are the Constitutional claims under § 1983.

Constitutions. The trial court granted all of the Defendants' motions.

On appeal, the Court of Appeals reversed the decision of the trial court on all grounds. *See Ripellino v. North Carolina School Boards Ass'n, Inc.*,___ N.C. App. ___, 627 S.E.2d 225 (2006) (*Ripellino II*). First, the Court reversed the Summary Judgment Orders on the non-constitutional claims by construing the applicability of an Automobile Exclusion Clause in the relevant Coverage Agreement. Second, on the damages claims under 42 U.S.C. § 1983, the Court held that the School Board was a "person" within the meaning of § 1983 such that Plaintiffs could proceed with their equal protection and due process claims. The Court did not, as it did previously in the opinion, affirmatively state whether the Trust Defendants liability, as a non-profit organization, was related to and a derivative of the School Boards liability on Plaintiffs' § 1983 claims. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d (1974) (noting that a private corporation is generally not a "person" and thus not liable under 42 U.S.C. § 1983).

As part of the Court of Appeals opinion, Judge Eric Levinson filed a dissenting opinion. Judge Levinson found that the trial court properly granted Defendants' Motions for Judgment on the Pleadings because, even assuming the factual allegations in the complaint were true, Plaintiffs failed to set forth sufficient facts which would entitle them to relief under any legal theory, including 42 U.S.C. § 1983. As previously referenced, Trust Defendants have

filed a Notice of Appeal pursuant to N.C. Gen. Stat. § 7A-30 on the issues discussed in Judge Levinson's dissent. Due to its ruling, however, the dissent made "no comment on whether a local school board is a 'person' within the meaning of 42 U.S.C. § 1983 (2005)." *Ripellino II,* ___ N.C. App. at ___, 627 S.E.2d at 234.

Trust Defendants file this Petition such that this Court may consider, contemporaneously with the issues in the dissent, the issue of whether defendants are "persons" under 42 U.S.C. § 1983. In as much as the Constitutional claims are all that remain against the Trust Defendants, this Petition does not discuss the issues involving Plaintiffs' non-constitutional claims pertaining to the Coverage Agreement. However, the Trust Defendants believe it is in the interest of judicial economy for this Court to consider all disputed issues currently pending on appeal.

REASONS CERTIFICATION SHOULD ISSUE

The criteria for Discretionary Review by the Supreme Court are set forth in N.C. Gen. Stat. § 7A-31 (2005). Certification may be utilized when (1) the subject matter of the appeal involves a significant public interest, (2) the cause involves legal principles of major significance to the jurisprudence of the State, or (3) the opinion of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court. On the issue of whether defendants are "persons" and can be sued for damages under 42 U.S.C. § 1983, there are multiple grounds present

under the statute such that certification is appropriate in this instance.

I. THE RECENT COURT OF APPEALS DECISION IS IN CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT.

Whether or not the School Board and the Trust Defendants can be sued for monetary damages under 42 U.S.C. § 1983 depends upon whether the Defendants are "persons" under § 1983. The United States Supreme Court has held that "States" and "arms of the State" are not considered "persons" under 42 U.S.C. § 1983, and thus "are not subject to [suits for damages] under § 1983 in either federal court or state court." *Howlett v. .Rose*, 496 U.S. 356, 365, 110 S.Ct. 2430, 2437, 110 L. Ed. 2d 332, 346 (1990). In contrast, "municipalities and other local government units" can be sued under § 1983. *Monell v. Dept' of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035, 56 L. Ed. 2d. 611, 635 (1978). Finally, private corporations are generally not subject to the Fourteenth Amendment unless acting under the color of State law, and thus they normally cannot be held liable under § 1983. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 1604, 26 L. Ed. 2d. 142 (1970).

Thus, whether or not the School Board is a "person" under § 1983 depends upon whether, under State law, "local school boards are considered local entities or part of the State." *Ripellino II*, ___ N.C. App. at ___, 627 S.E.2d at 230. The Court of Appeals found this to be an issue of first impression, and ultimately concluded that local school boards were

local entities and "persons" under § 1983, meaning they could be sued for damages. *Id.* at ___, 627 S.E.2d at 230, 233.

The underlying holding is in direct conflict with prior precedent of the North Carolina Supreme Court. This Court has previously stated that local school boards are part of, under the exclusive control of, and derive their power from the State itself:

> The public school system, including all its units, is under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable. When functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government, so general as to require appropriate limitations on their exercise; they express the immediate power of the State, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution and under its direct delegation.

Bridges v. Charlotte, 221 N.C. 472, 478, 20 S.E.2d 825, 830 (1942) (emphasis added).

In addition to *Bridges,* other cases have noted the relationship between local school boards and the

State. In considering the function of a local school board, this Court stated in *Rowan County Bd. of Educ. v. U.S. Gypsum Co.,* 332 N.C. 1, 11, 418 S.E.2d 648, 655 (1992), that a school board was acting as an "arm of the State" when carrying out its official duties. This holding was based in part on the fact that the State, which has the responsibility to provide free public schools, had (1) delegated State administrative and operational powers to the local boards themselves and (2) provided these local boards with considerable operating revenues from State funds. *Id.* This Court has also held that a "member of the [local] county board of education holds a public office under the State," in contrast to a mayor who is part of a political subdivision of the State. *Edwards v. Bd. of Educ. of Yancey County,* 235 N.C. 345, 351, 70 S.E.2d 170, 174 (1952).

These Supreme Court cases concluded that local school boards should be considered "arms of the State" instead of a local municipality. These decisions, however, are in direct conflict with the Court of Appeals decision which held that a local school board was a "person" under 42 U.S.C. § 1983. In order to be a person under § 1983 a local school board must be considered a local municipal agency, which is something this Court has never held. Furthermore, the Court of Appeals in this case never decided the dispositive question of whether -a local school board was part of the State or a local municipal unit; instead the Court based its decision upon the fact that a local school board "performs . . . purely local functions" and is "separately liable from the State." *Ripellino II,* ___ N.C. App. at ___, 627 S.E.2d at 233 (quoting in part *Turner v.*

Gastonia City Bd. of Educ., 250 N.C. 456, 463, 109 S.E.2d 211, 216 (1959)). Because the Court of Appeals' decision is contrary to multiple Supreme Court cases and left an important issue undecided, this Court should certify this case for review.

At minimum, this Court should review this case to clarify any apparent conflict in the case law. The underlying opinion found that "[t]here is conflicting authority from our Supreme Court about whether local school boards are considered local entities or part of the State." *Id.* See *also Ripellino I,* 158 N.C. App. at 430-431, 581 S.E.2d at 93-94 (noting that in this case "plaintiffs may not be entitled to monetary relief pursuant to section 1983 against defendants" due to issues surrounding whether defendants were "persons" under the statute). Because of this apparent conflict, the underlying opinion went into a long and detailed examination of the "underlying structure of our school system." Trust Defendants assert that this analysis was unnecessary because the relevant precedent points to the conclusion that a local school board is part of the State. In reaching the underlying decision, however, the Court relied upon one less persuasive authority to support its ultimate conclusion. *Ripellino II,* ___ N.C. App. at ___, ___ S.E.2d at 231 (citing *Turner, supra*).

Regardless of the parties' contentions, multiple panels of the Court of Appeals have found conflicts in this area of the law. Accordingly, this Court should certify these issues for review in order to resolve any apparent discrepancy in the law.

II. THE HOLDING OF THE COURT OF APPEALS INVOLVES LEGAL ISSUES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE OF NORTH CAROLINA.

It is without question that the public school system is one of, if not the most, important functions of State Government. This Court has recognized that the requirements of our State Constitution regarding the public school system "are imperative" and "intended to establish a system of public education adequate to the needs of a great and progressive people." *Bd. of Educ. v. Bd. of Com'rs of Granville County,* 174 N.C. 469, 472, 93 S.E. 1001, 1002 (1917). *See also Leandro v. State of North Carolina,* 346 N.C. 336, 488 S.E.2d 249 (1997) (concluding that the State Constitution guarantees, and the State has the duty to provide, every child "an opportunity to receive a sound basic education in our public schools"); *Bridges,* 221 N.C. 472, 20 S.E.2d at 833 (calling the public schools the "State's largest and most important enterprise").

The holding of the Court of Appeals in *Ripellino II,* that the School Board is a "person" under § 1983, means that the door is wide open for plaintiffs to bring damages claims against school systems, under 42 U.S.C. § 1983, for apparent Constitutional violations or other violations of the law. The primary issue of whether the law allows these claims and other lawsuits against Defendants should be addressed by this Court in order to avoid future litigation in this area.

Accordingly, Trust Defendants respectfully request this Court to review the issue of whether Defendants are "persons" under 42 U.S.C. § 1983 and whether a local school board is a part of the State or instead a local unit because it will have a major impact of the jurisprudence of this State for years to come.

ISSUES TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Trust Defendants intend to present the following issues in its brief to the Court:

1. WHETHER THE DEFENDANTS ARE "PERSONS" UNDER 42 U.S.C. § 1983.

2. WHETHER THE DEFENDANTS ARE AN "ARM OF THE STATE" OR A LOCAL MUNICIPALITY UNIT UNDER NORTH CAROLINA LAW?

3. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S RULING THAT THE CONSTITUTIONAL CLAIMS IN PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED AS A JUDGMENT ON THE PLEADING, PURSUANT TO RULE 12 (C) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE?

Respectfully submitted, this /11th/ day of /April/, 2006.

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U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United

States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

21 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.C.G.S.A. § 115C-42. Liability insurance and immunity.

Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

Any contract of insurance purchased pursuant to this section shall be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance and shall by its terms adequately insure the local board of education against liability for damages by reason of death or injury to person or property proximately caused by the negligent act or torts of the agents and employees of said board of education or the agents and employees of a particular school in a local administrative unit when acting within the scope of their authority. The local board of education shall determine what liabilities and what officers, agents and employees shall be covered by any insurance purchased pursuant to this section. Any company or corporation which enters into a contract of insurance as above described with

a local board of education, by such act waives any defense based upon the governmental immunity of such local board of education.

Every local board of education in this State is authorized and empowered to pay as a necessary expense the lawful premiums for such insurance.

Any person sustaining damages, or in case of death, his personal representative may sue a local board of education insured under this section for the recovery of such damages in any court of competent jurisdiction in this State, but only in the county of such board of education; and it shall be no defense to any such action that the negligence or tort complained of was in pursuance of governmental, municipal or discretionary function of such local board of education if, and to the extent, such local board of education has insurance coverage as provided by this section.

Except as hereinbefore expressly provided, nothing in this section shall be construed to deprive any local board of education of any defense whatsoever to any such action for damages or to restrict, limit, or otherwise affect any such defense which said board of education may have at common law or by virtue of any statute; and nothing in this section shall be construed to relieve any person sustaining damages or any personal representative of any decedent from any duty to give notice of such claim to said local board of education or to commence any civil action for the recovery of damages within the applicable period of time prescribed or limited by statute.

A local board of education may incur liability pursuant to this section only with respect to a claim arising after such board of education has procured liability insurance pursuant to this section and during the time when such insurance is in force.

No part of the pleadings which relate to or allege facts as to a defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this section. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury and such issues shall be heard and determined by the judge without resort to a jury and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto unless the defendant shall request a jury trial thereon: Provided, that this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transportation service vehicle drivers, while driving school buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Public School Fund.

N.C.G.S.A. § 115C-44. Suits and actions

(a) A local board of education shall institute all actions, suits, or proceedings against officers, persons, or corporations, or their sureties, for the recovery, preservation, and application of all money or property which may be due to or should be applied to the support and maintenance of the schools, except in case of the breach of his bond by the treasurer of the county school fund, in which case action shall be brought by the board of county commissioners.

(b) In all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary.

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Nos. 06-1399 & 06-1511

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, *et al.*,

Petitioners,

-and-

JOHNSTON COUNTY BOARD OF EDUCATION,

Petitioner,

v.

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, and NICOLE RIPELLINO,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petitions, where the North Carolina Supreme Court, in affirming the North Carolina Court of Appeals, found Respondents' complaint met the legal requirements necessary for pleading due process and equal protection violations under 42 U.S.C. § 1983.

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Respondents, Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino, oppose the two Petitions for a Writ of Certiorari to review the judgment of the North Carolina Supreme Court.

STATEMENT OF THE CASE

Respondents adopt and incorporate by reference the statement of the case that is set forth in the Petitions for Writs of Certiorari. However, it is respectfully submitted that the North Carolina Supreme Court's decision should be upheld because Respondents' complaint adequately states federal constitutional claims for due process and equal protection under 42 U.S.C. § 1983.

REASONS FOR DENYING THE PETITIONS

I. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT, IN AFFIRMING THE COURT OF APPEALS, PROPERLY CONCLUDED THE RESPONDENTS' COMPLAINT STATES THE REQUIREMENTS NECESSARY FOR A PROCEDURAL DUE PROCESS VIOLATION BY ASSERTING A PROPERTY INTEREST THAT HAS BEEN INTERFERED WITH BY THE LOCAL SCHOOL BOARD.

Initially, it is important to note that Fourth Circuit and North Carolina case law supports the premise that a local board of education is not an "arm of the State." *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 226 (4th Cir. 2001); *Turner v. Gastonia City Bd. of Educ.*, 109 S.E.2d 211 (N.C. 1959); *Meyer v. Walls*, 489 S.E.2d 880 (N.C. 1997).

Petitioners claim that the Johnston County Board of Education is an "arm of the State," and as such, it has immunity. However, the Fourth Circuit Court of Appeals definitively held in *Cash v. Granville County Bd. of Educ.* that a local board of education is a "person" within the meaning of Section 1983 and is capable of being sued for monetary damages. 242 F.3d 219, 226 (4th Cir. 2001). Respondents state this in paragraph 44 of their complaint, by stating that all Petitioners are "persons" under 42 U.S.C. § 1983 and were acting "under the color of state law," being N.C. Gen. Stat. § 115C-142 and other applicable North Carolina statutes. (Petr.'s App. 97.)

As Petitioners correctly note, this Court has recognized a procedural due process violation when the State or an entity acting "under the color of state law" does not follow appropriate procedures in interfering with an individual's life, liberty, or property interest. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *See generally Matthews v. Eldridge*, 424 U.S. 319 (1976). Respondents meet this test by asserting a property interest in a benefit that has been interfered with by Petitioners, acting under the color of state statute, N.C. Gen. Stat. § 115C (2007).

In order to assert a property interest, needed for a due process violation under 42 U.S.C. § 1983, a Plaintiff must show that he has a "legitimate claim of entitlement" to a benefit; this benefit may be provided by state law. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Respondents' claim of entitlement comes directly from the North Carolina General Statutes. N.C. Gen. Stat. § 115C-43 provides that:

> [T]he local board of education shall have adopted, and made available for public inspection, uniform

> standards under which claims made, civil judgments entered, or criminal charges against members or employees or former members and employees shall be defended or paid.

N.C. Gen. Stat. § 115C-43(c)(ii) (2007). This state statute specifically gives Respondents an entitlement to uniform, published standards set forth by the School Board, which detail how claims will be defended and paid.

Petitioners admit that in the past they have paid injured individuals for both their property and tort damages, and they have used no uniform standards or guidelines to govern which claims they pay. (*Ripellino I* R. Ex. 10, 66, 84-85.) Here, they arbitrarily decided only to pay Respondents $2,153.18 for the Ripellinos' property damage, and assert immunity as to their tort damages.

Petitioners claim that Respondents do not have a "legitimate claim of entitlement" to have their tort claim paid; however this misstates the entitlement that Respondents assert. Through § 115C-43(c), Respondents assert an entitlement to have their tort claim considered under uniform standards, and thereafter a jury trial if necessary, and this "legitimate claim of entitlement" gives Respondents a property interest.

Since Petitioners admittedly have no uniform guidelines detailing how claims will be evaluated, defended and paid, Respondents' property interest in a uniform review of claims has been interfered with by Petitioners. Respondents clearly allege this violation in their complaint. Paragraphs 45-49 of Respondents' complaint specifically describe how Petitioners arbitrarily and intentionally vested absolute discretion in local school board officials regarding the payment and defense of

claims. (Petr.'s App. 97-98.) In fact, it is undisputed that the Board, at its discretion, raises the immunity defense and pays claims without following any published uniform standards, in violation of N.C. Gen. Stat. § 115C-43(c). (Petr.'s App. 107-08, 121; *Ripellino I* R Ex. 10, 66.)

Petitioners voluntarily paid the Respondents $2,153.18 for their property damage claim, but asserted immunity for the remaining injury claim, and refused to pay medical expenses and other compensation. Petitioners' decision to not pay Respondents' entire claim was not made after consulting uniform guidelines required by state law because as stated above, Petitioners have no uniform guidelines. As a result, Petitioners' refusal of payment violated Respondents' procedural due process rights because Petitioners did not follow the proper legal procedure required for the payment and defense of claims.

Petitioners claim that Respondents do not and cannot have a property interest that was interfered with because the Board used absolute discretion in denying payment of Respondents' tort claim. This Court has said that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion;" however, the only reason Petitioners act with "absolute discretion" is because they continue to violate state law in their handling of claims. *Town of Castle Rock*, 545 U.S. at 756. N.C. Gen. Stat. § 115C-43(c)(ii) requires the Board to have public, uniform standards for the defense and payment of claims, and these standards take away Petitioners' discretion in paying and defending claims. Therefore, Petitioners would not have absolute discretion if they had complied with state law. As such, it is respectfully submitted that this Court should not condone violations of state law by finding that Respondents have no "entitlement" as a result of the Board's absolute discretion.

The Respondents' procedural due process violation has been and continues to be compounded by the denial of a jury trial. Under state law, Respondents have a fundamental right to a jury trial. *In re Will of Buck*, 516 S.E.2d 858, 861 (N.C. 1999). This right has been denied over and over again by Petitioners, starting with the initial denial of the tort claim, followed by the motion for bifurcation, two repetitive appeals to the N.C. Court of Appeals, an unsuccessful appeal to the North Carolina Supreme Court, and now the filing of two Petitions before this Court. These appeals have denied Respondents their right to be heard, which according to this Court, is the heart of the Due Process Clause. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Therefore, not only did Petitioners deny Respondents proper process in deciding whether to pay their tort claim, they also continue to violate Respondents' right to due process by denying them their requested jury trial.

II. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT, IN AFFIRMING THE COURT OF APPEALS, PROPERLY FOUND THE RESPONDENTS' COMPLAINT CONTAINS THE REQUIREMENTS NECESSARY FOR A SUBSTANTIVE DUE PROCESS VIOLATION BY ASSERTING A FUNDAMENTAL INTEREST.

This Court has stated that for substantive due process claims, when a fundamental right has been interfered with by the state, the state's conduct is subject to strict scrutiny judicial review. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (citing *Reno v. Flores*, 507 U.S. 292, 301-02 (1993)); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S.

621, 627 (1969) (stating that a state statute that grants some people the right to vote but denies others must be related to a compelling state interest). However, if a non-fundamental interest is asserted, then for a substantive due process violation to exist, the conduct must not be rationally related to a legitimate state interest. *Glucksberg*, 521 U.S. at 719-20.

As stated previously, Respondents' property interest that has been violated is their entitlement to have their tort claim reviewed under published, uniform standards, as required by state statute. Petitioners interfered with this interest by using "absolute discretion" in determining whether Respondents' tort claim should be paid, instead of applying the uniform standards as required by N.C. Gen. Stat. § 115C-43(c)(ii). Respondents clearly detailed Petitioners' arbitrary and intentional use of "absolute discretion" in paragraphs 45-49 of their complaint. (Petr.'s App. 97-98.)

Petitioners' interference violated Respondents' substantive due process because their use of "absolute discretion" is not rationally related to a legitimate state interest. In exercising "absolute discretion" in defending and paying claims, Petitioners violated § 115C-43(c)(ii), which requires published, uniform standards regarding the handling of claims by school boards. Petitioners have no standards or guidelines which they follow. (*Ripellino I* R Ex. 10, 66.)

The State of North Carolina saw it necessary to create a law requiring uniform standards for the defense and payment of local school board claims; therefore, Petitioners' lack of uniform standards, in violation of § 115C-43(c)(ii), is not and cannot be rationally related to a legitimate state interest. The North Carolina legislature would not have felt the need to

implement a statute if "absolute discretion" furthered a legitimate state interest.

In addition, Respondents have a fundamental right to a jury trial for their tort claim, which Petitioners have tried to destroy through their tortured use of the terms "absolute discretion." *In re Will of Buck*, 516 S.E.2d 858, 861 (N.C. 1999). This right to a jury trial has been found to be substantive, meaning that the denial of it may give rise to a substantive due process claim. *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 10 (N.C. 2004) (quoting *Kiser v. Kiser*, 385 S.E.2d 487, 489 (N.C. 1989)). As stated previously, Respondents' fundamental right to a jury trial has been repeatedly denied by Petitioners' through extensive appeals. It is respectfully submitted that Petitioners' denial of Respondents' fundamental right would be subjected to the strictest scrutiny by this Court. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). In order to overcome strict scrutiny review, the objective being pursued under the color of state law must be compelling, not just legitimate, and the means used to achieve this objective must be necessary. *Glucksberg*, 521 U.S. at 721. This Court has stated that there is a presumption that actions under state law, which affect fundamental rights, do not meet strict scrutiny judicial review, and as such, the burden is on the entity to show a compelling interest and narrowly tailored means. *Id.*

Petitioners' conduct of using repeated appeals to avoid a jury trial on the merits of Respondents' tort claim does not achieve a compelling interest. The North Carolina Court of Appeals and the North Carolina Supreme Court both found that Respondents' complaint sufficiently alleged constitutional claims; however, Petitioners continue spending

taxpayer money on further appeals, claiming that the complaint is insufficient. (Petr.'s App. 1-26.) These further appeals compound Respondents' denial of a jury trial, without furthering any compelling interest. Furthermore, it is important to note that the burden is on Petitioners to show a compelling state interest, and it is respectfully submitted that they cannot do so.

III. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT FOUND, IN AFFIRMING THE COURT OF APPEALS, THAT RESPONDENTS' COMPLAINT RAISED GENUINE QUESTIONS AS TO WHETHER PETITIONERS' DISCRIMINATORY PRACTICE WAS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

As the Petitioners point out, "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination. . . ." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Paragraphs 45-50 of Respondents' complaint specifically describe how Petitioners violated Respondents' equal protection rights by arbitrarily exercising their authority to defend and pay claims in a way that *intentionally and capriciously discriminates* against similarly situated people. (Petr.'s App. 97-98.) It is undisputed that Petitioners have a routine and habit of asserting immunity in some claims, but paying other claims where immunity could have been asserted without providing any guidelines or standards that they follow. (Petr.'s App. 107-08, 121.) In fact, as previously stated, Petitioners have no such uniform guidelines or standards. (*Ripellino I* R Ex. 10, 66.)

By exercising what they call "absolute discretion," Petitioners intentionally and arbitrarily treat some claimants differently than they treat others. In the past, Petitioners have paid other injured individuals for both their property and tort damages, whereas Petitioners only paid Respondents $2,153.18 for property damage, and then asserted immunity as to the tort damages. Petitioners gave no reasons for paying the property damages, but not the tort claim. (*Ripellino I* R Ex. 84-85.)

In paragraph 45 of their complaint, it is alleged that Respondents are similarly situated to other tort claimants who have requested a jury trial after their claim was denied by the Petitioners, under a theory of "absolute discretion." As stated in paragraphs 45-50 of Respondents' complaint, Petitioners have a custom or history of paying some claims but not paying others, and Respondents fall into the same category as these other claimants who were first denied compensation by the Petitioners without having their claim analyzed under uniform, published standards, and secondly were denied a jury trial. (Petr.'s App. 97-98.)

This Court has stated that for equal protection claims where the state's conduct "neither proceeds along suspect lines nor infringes upon fundamental constitutional rights," the conduct must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993). Petitioners' conduct of exercising absolute discretion in defending and paying claims does not meet this test, and is not rationally related to a legitimate governmental interest. N.C. Gen. Stat. § 115C-43(c)(ii) specifically requires Petitioners to use published, uniform guidelines when evaluating payment of claims, and as such, it prohibits the

Board's exercise of "absolute discretion" in defending and paying claims. As previously stated, since Petitioners violate Section 115C-43(c)(ii) by having no such standards, it is respectfully submitted that Petitioners' conduct cannot be rationally related to a legitimate governmental interest. *Pennell v. City of San Jose*, 485 U.S. 1 (1988). If Petitioners' conduct is not even rationally related to a legitimate government interest, then there is no possibility that it meets the higher standard of strict scrutiny, which is applicable since Petitioners denied and continue to deny Respondents' fundamental right to a jury trial.

As such, it is respectfully submitted that Respondents' equal protection rights have been violated, which their complaint adequately alleges.

CONCLUSION

For these reasons, it is respectfully submitted that the Petitions for a Writ of Certiorari filed by Petitioners should be denied.

Respectfully submitted,

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